STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS The Honorable Mark J. Cavanagh, Presiding Judge

CASTLE INVESTMENT COMPANY,

Plaintiff-Appellant,

vs.

Supreme Court No. 121598
Court of Appeals No. 224411
Wayne County Circuit Court
No. 98-836330-CZ

CITY OF DETROIT,

Defendant-Appellee.

BRIEF ON APPEAL - APPELLLANT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	NT OF MATERIAL FACTS AND PROCEEDINGS
RGUMEN	NTS
I.	THE DEFENSE OF LACHES IS NOT GENERALLY A PROPER GROUND FOR SUMMARY DISPOSITION AND IS NOT APPLICABLE TO A MORE THAN 20 YEAR OLD NON-ZONING ORDINANCE THAT IS NOW BEING CHALLENGED FOR LACK OF REQUIRED GUIDELINES NECESSARY FOR ENFORCEMENT OF THE ORDINANCE.
	A. Laches is not a Proper Ground for Accelerated Judgment
	B. The Validity of an Ordinance May be Challenged at any Time
	C. The Use of Zoning Ordinances in Support of a Defense of Laches is Inapplicable in the Instant Case
II.	THE RECORD IN THIS CASE DOES NOT CONTAIN SUFFICIENT COMPETENT MATERIAL AND SUBSTANTIAL EVIDENCE TO JUSTIFY THE CONCLUSION OF THE COURT OF APPEALS THAT LACHES APPLIES BECAUSE APPELLEE WOULD BE SUBSTANTIALLY PREJUDICED IN DEFENDING A COMPLAINT REGARDING AN ORDINANCE THAT HAS BEEN IN EFFECT FOR MORE THAN 20 YEARS.
	A. The Court Of Appeals Opinion Does Not Make It Clear That Defendant-Appellee Suffered Non-Economic Prejudice On The Reasons Given By Defendant-Appellee And The Record Does Not Substantiate Said Reasons

INDEX OF CASES AND AUTHORITIES CITED

MICHIGAN STATUTES

MCLA 600.5813; MSA 27A.581316
MCLA 750.410; MSA 28.6427
Public Act 1925, No. 280
Public Act 1947, No. 123
Public Act 1975, No. 125
CASES
American Trucking Assoc. v Conway, 152 Vt 363; 566 A2d 1323, 1334 (1989)7
Badon v General Motors Corp., 188 Mich App 430; 470 NW2d 436 (1991)12
Bonney v Upjohn, 129 Mich App 18; 342 NW2d 551 (1983)12, 13
Bourke v North Rive Ins. Co., 117 Mich App 461; 324 NW2d 52 (1982)6
Brand v Hartman, 122 Mich App 326; 332 NW2d 479 (1983), rev'd on other grounds, 422 Mich 883; 367 NW2d 67 (1985)10
Butcher v Detroit, 131 Mich App 698; 347 NW2d 702 (1984)
Butcher v Detroit, 156 Mich App 165; 401 NW2d 260 (1986)
Casco Twp v Brame Trucking Co., Inc, 34 Mich App 466, 470-471; 191 NW2d 506 (1971)10
Edel v Filler Township, 49 Mich App 210; 211 NW2d 547 (1973)8, 9, 14, 16
In re MacLoughlin, 82 Mich App 301; 266 NW2d 800 (1978)6
Joy Management Co. v City of Detroit, 183 Mich App 334, 455 NW2d 55 (1990)
Lothian v City of Detroit, 414 Mich 160; 324 NW2d 9 (1982)

Matter of Crawford's Estate, 115 Mich App 19; 320 NW2d 276 (1982)12
Northville Area Non-Profit Housing Corp. v Walled Lake, 43 Mich App 424; 204 NW2d 274 (1972)9
Plasger v Leonard, 316 Mich 174; 25 NW2d 156 (1947)12
Quarderer v Shiawassee County Drain Comm'r, 82 Mich App 692; 267 NW2d 151 (1978)6
Renne v Waterford Twp, 73 Mich App 685, 690; 252 NW2d 842 (1977)10
Richmond Township v Erbes, 195 Mich App 210; 489 NW2d 504 (1992)9
Robyns v City of Dearborn, 341 Mich 495; 67 NW2d 718 (1954)10
Sedger v Kinnco, Inc., 177 Mich App 69; 441 NW2d 5 (1988)
Sprague v Casey, 520 Pa 38; 50 A2d 184, 189 (1988)7
Watnick v City of Detroit, 365 Mich 600; 113 NW2d 876 (1962)12
Woll v Attorney General, 409 Mich 500; 297 NW2d 578 (1980)
CITY OF DETROIT ORDINANCES AND CITY CHARTER
Ordinance 124-H
Ordinance 213-H
Municipal Code Section 26-3-1 et seq1, 2
Detroit City Charter, Sec. 4-1072
OTHER AUTHORITIES
27A <u>Am Jur 2d</u> , § 192, p. 66916
Black's Law Dictionary, 5th ed9
MCR 2.116(C)(8)

MCR 2.116(C)(10)	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,
* * *	
1 Michigan Municipal Law, sec. 5.58 (19	80)

STATEMENT OF QUESTIONS INVOLVED

I. IS THE DEFENSE OF LATCHES GENERALLY A PROPER GROUND FOR SUMMARY DISPOSITION AND IS IT APPLICABLE TO A MORE THAN 20 YEAR OLD NON-ZONING ORDINANCE THAT IS NOW BEING CHALLENGED FOR LACK OF REQUIRED GUIDELINES FOR ENFORCEMENT OF THE ORDINANCE?

Plaintiff-Appellant answers "No."

Defendant-Appellee answers "Yes."

The Court of Appeals answered "Yes."

II. DOES THE RECORD IN THIS CASE CONTAIN SUFFICIENT COMPETENT MATERIAL AND SUBSTANTIAL EVIDENCE TO JUSTIFY THE CONCLUSION OF THE COURT OF APPEALS THAT LATCHES APPLIES BECAUSE APPELLEE WOULD BE SUBSTANTIALLY PREJUDICED IN DEFENDING A COMPLAINT REGARDING AN ORDINANCE THAT HAS BEEN IN EFFECT FOR MORE THAN 20 YEARS?

Plaintiff-Appellant answers "No."

Defendant-Appellee answers "Yes."

The Court of Appeals answered "Yes."

Instead of approving the use of the guidelines for use in Ordinance 124-H as amended by 213-H and notifying the general public by resolution that the guidelines existed and were available, the action of the council was to "receive and place on file" the guidelines as stated at the end of Plaintiff's Exhibit 4, which is a copy of the recommended guidelines. Receiving and placing on file is not the same as approving the guidelines.

Sec. 26-3-6 of the ordinance states that the guidelines shall not be effective until approved by city council. Sec. 4-107 of the City Charter, (Plaintiff's Exhibit 5), provides that "[e]xcept as otherwise provided by this Charter, no action of the city council shall be effective unless adopted by at least a majority of city council members present." Since the guidelines relating to the enforcement of the ordinance were not approved and published in accordance with the ordinance requirements, Plaintiff-Appellant alleges that the guidelines are not effective and the ordinance is not valid and cannot be enforced.

Further, since the Council did not approve the guidelines, Plaintiff-Appellant alleges that the Department of Building & Safety Engineering is acting in accordance with its own will and is usurping the legislative law-making function in violation of the constitutional doctrine of separation of powers, such that the ordinance, besides being invalid and unenforceable, is also unconstitutional.¹

The ordinance at issue with its amendment evolved from what began as emergency Ordinance 9-H enacted in October, 1974, effective November, 1974 that required a certificate of approval from the city's Building and Safety Engineering Department for the sale of one and two family homes (Plaintiff's Exhibit 6). Section 12-7-3 of the emergency ordinance provided that the Building and Safety Engineering Department promulgate rules and regulations for the inspection of said homes to ensure that such dwellings, at time of sale, conformed with minimum standards of livability and habitability. No provision was added to require the City Council to approve the rules and regulations. The emergency ordinance was set to expire in February, 1975.

In February, 1975 the City Council established a task force to create a new ordinance for building inspections as a result of a January, 1975 letter from the mayor and a February, 1975 public hearing. In the interim the City Council passed Ordinance 104-H, (Plaintiff's Exhibit 7), which directed the Building and Safety Engineering Department to promulgate rules and regulations with respect to a Certificate of Approval. Again, the ordinance did not require the City Council to approve the rules and regulations.

Upon submission of proposed regulations by the task force in June, 1976, the City Council passed Ordinance 124-H, at issue here, which states that the guidelines used for inspection are not effective until approved by the City Council. No evidence exists to show that Council ever approved the guidelines.

Procedurally, Defendant-Appellee City of Detroit first filed a motion for summary disposition under MCR 2.116(C)(8) in lieu of an answer to the complaint on the general ground of failure to state a claim upon which relief could be granted and that assuming all of the factual allegations of the complaint were true, Plaintiff-Appellant was entitled to no relief because its claim was based on an erroneous conclusion of law, namely, that the City Council's failure to approve the guidelines rendered the Ordinance invalid and unenforceable. Specifically, Defendant-Appellee argued against its own ordinance in that it maintained that the requirement that City Council approve the guidelines was invalid because it conflicted with the separation of powers provisions of the city charter by conflicting with the rule-making power of the executive branch and the mayor's veto power, that the requirement of City Council approval was severable from the rest of the ordinance such that all other provisions of the ordinance remained valid despite the invalidity of that requirement, that the ordinance did not violate any provision of the United State or Michigan Constitution, and that even if the requirement that council approve the guidelines were valid, enforcing it by invalidating the rest of the ordinance would violate the intent of City Council. In a written opinion, the motion was denied by the trial court. The trial court's opinion focused on the issue of whether the guidelines approval requirement violated the separation of powers doctrine and eventually found that "Defendant has failed to demonstrate that Plaintiff's claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."

After certification of the class in June, 1999, Plaintiff filed its own motion for summary disposition under MCR 2.116(C)(10) on the general ground that there was no genuine issue of material fact and Plaintiff-Appellant was entitled to judgment as a matter of law. Specifically Plaintiff-Appellant argued that the Detroit City Council failed to approve the inspection guidelines as required under the ordinance, such that no guidelines existed for inspection upon

which a certificate could be issued, that the City Council approval requirement did not conflict with the rule-making power of the executive branch of government, that the City Council approval requirement was not severable from the rest of the ordinance since the substance of the ordinance depends upon approved guidelines to be used for inspection, making the ordinance invalid and unenforceable, and that payment of illegal inspection fees and charges was the product of duress since failure to comply with the ordinance was a misdemeanor punishable by fine and/or imprisonment, and such fees should be refunded.

Defendant-Appellee responded with a cross-motion for summary disposition on the specific grounds that laches and estoppel were applicable in the instant matter, (Appendix pp. 8a – 13a), that public policy considerations for an ordinance of advanced age should prevent a successful challenge, (Appendix pp. 8 – 13a), that even if the guidelines were invalid, they were severable from the remainder of the ordinance without effecting the validity of the ordinance, and that the case law cited by Plaintiff-Appellant in its motion for summary disposition mandated a grant of summary disposition in favor of Defendant-Appellee.

The trial court denied Plaintiff's-Appellant's motion for summary disposition and granted Defendant's-Appellee's motion for summary disposition on the grounds of laches and collateral estoppel, thereby disposing of the case. (Appendix pp 14a –15a). No explanation of the court's decision was provided.

Plaintiff-Appellant thereafter timely filed its motion for reconsideration, (Appendix pp. 16a – 22a), which was denied by the new trial judge, the first trial judge having retired. (Appendix p. 23a).

Plaintiff-Appellant then appealed to the Court. of Appeals by right, (Appendix p. 24), arguing that laches was not generally a proper ground for summary disposition and is not applicable to a more than 20 year old non-zoning ordinance being challenged for lack of required guidelines. It also argued that collateral estoppel did not apply to the instant case because the

guidelines issue had never been raised or litigated by any court. Defendant-Appellee filed a cross-appeal, arguing that the court erred in denying its first motion for summary disposition.

By opinion dated March 19, 2002 the Court of Appeals affirmed the Circuit Court decision that the claim was barred by laches, found that the trial court erred in concluding that collateral estoppel applied to the instant matter (since it had never been litigated) but the error was harmless, and held that Defendant-Appellant's cross appeal was moot because of its finding of laches. (Appendix pp 25a-29a).

Plaintiff-Appellant timely filed a motion for rehearing, arguing that there was no factual record of evidence of prejudice to the Defendant-Appellant due to "insufferable" financial damage to support the Court's finding of laches, that the statute of limitations would not permit collection of refunds beyond the six-year limit, and that there would be no "chaotic conditions beyond all comprehension" because of all of the potential plaintiffs lined up to sue Defendant to recover the fees previously paid, since the action had been certified as a class action. (Appendix pp 30a – 34a). On May 1, 2002, the Court of Appeals denied Plaintiff-Appellant's Motion for Rehearing. (Appendix p 35a).

Application for Leave to Appeal was sought from the Supreme Court on May 20, 2002, (Appendix pp 36a – 42a) and was granted by Order of this Court dated March 25, 2003, (Appendix p 43a).

ARGUMENTS

I. THE DEFENSE OF LACHES IS NOT GENERALLY A PROPER GROUND FOR SUMMARY DISPOSITION AND IS NOT APPLICABLE TO A MORE THAN 20 YEAR OLD NON-ZONING ORDINANCE THAT IS NOW BEING CHALLENGED FOR LACK OF REQUIRED GUIDELINES NECESSARY FOR ENFORCEMENT OF THE ORDINANCE.

The trial court and the Court of Appeals agreed with the Defendant's defense of laches to Plaintiff's claim that the City of Detroit's ordinance was invalid because it lacked the guidelines necessary to enforce the subject ordinance. At the time of filing of the instant complaint in 1998, the ordinance at issue had been in effect some 22 years. The timeliness of the challenge to the ordinance was not applicable to the instant case.

A. Laches is not a Proper Ground for Accelerated Judgment.

The law of Michigan currently holds that laches is not a proper ground for accelerated (or summary) judgment. Bourke v North River Ins. Co., 117 Mich App 461; 323 NW2d 52 (1982); Quarderer v Shiawassee County Drain Comm'r, 82 Mich App 692; 267 NW2d 151 (1978). Further, the granting of a motion for summary judgment [disposition] because of laches before the proofs of the parties have been presented is inappropriate because the doctrine of laches must cover the situation before the court after the facts have been presented. In re MacLoughlin, 82 Mich App 301; 266 NW2d 800 (1978). In the instant case, the only specific facts presented to the trial court before its conclusion that laches applied was that the ordinance had been in effect for more than 20 years and had previously been subjected to and withstood other constitutional challenges. Without more, summary disposition on the basis of laches should not have been granted herein.

B. The Validity of an Ordinance May be Challenged at any Time.

1 Michigan Municipal Law, sec. 5.58 (1980), entitled, "Time for Commencing Proceedings", states that "[t]he validity of an ordinance may be challenged at any time. An action challenging a long-standing ordinance was sustained where the delay did not prejudice a

defendant municipality or others. Shaefer v. City of East Detroit, 360 Mich. 536, 104 NW2d 390 (1960)." [Emphasis added]. In Woll v Attorney General, 409 Mich 500; 297 NW2d 578 (1980), a statute, MCLA 750.410; MSA 28.642, making it a crime to solicit personal injury claims was challenged. The statute was passed by Public Act 1925, No. 280. It was amended by Public Act 1947, No. 123 and by Public Act 1975, No. 125. In footnote one of the case, the Court specifically stated that Woll's complaint spoke to the statute as it read before the 1975 amendments. The particular complaint for declaratory and injunctive relief was decided over 33 years from when the statute was first amended. The Michigan Supreme Court did not bar the claim on the basis that it was not begun timely.

Where constitutionality or validity of a law is at issue, extra-jurisdictional courts have made very clear statements on the timeliness of challenges to such laws even in the face of public policy considerations where the challenged unit is a government reaping the benefits of revenues collected there from. In *Sprague v Casey*, 520 Pa 38; 550 A2d 184, 189 (1988), Exhibit 8, the Court stated:

See also Commonwealth v Gilligan, 10195 Pa. 504, 46A. 124 (1900). As early as 1900 Justice Mitchell explicitly stated that laches would not, *ipso facto*, operate to prevent the court from declaring an act void in violation of the constitution, even if the traditional elements of laches had been established.

The act has stood on the statute book, without challenge for nearly a quarter of a century, and millions of dollars of school funds have been collected and disbursed under its provisions. . . [T]hese are not reasons for refusing to declare it void if in contravention of the constitution, . . . id. at 511, 46 A. at 125.

In *American Trucking Assoc. v Conway*, 152 Vt 363; 566 A2d 1323, 1334 (1989), Exhibit 9, the Court rejected the defense of laches in a constitutional challenge to a 30 year old law and held:

Last, defendants claim that because plaintiffs did not challenge the provision of § 417 until thirty years after this reciprocal truck tax was first created, they should now be precluded from asserting its unconstitutionality under the doctrine of laches. The equitable doctrine of laches is applied to prohibit the maintenance of actions where the party requesting relief has failed to assert his

right for an unreasonable and unexplained period of time and where the delay has been prejudicial to the defending party. Stamato v Quazzo, 139 Vt. 155,157, 423 A. 2d 1201, 1203 (1980). Defendants have made no showing of prejudice of such substance warranting it inequitable for us to uphold plaintiffs' constitutional challenge to the tax statute at issue. Their claims of prejudice are centered on the contention that because the state has successfully collected taxes under various incarnations of § 417(a) for over thirty years, it ought not to lose this revenue now merely because the law is unconstitutional.

We query whether the doctrine of laches can ever be used to preclude a constitutional challenge of a taxing statute. It would be the epitome of inequity to allow an unconstitutional law to remain in effect merely because, in the traditional terms of equitable jurisprudence, someone "slumbered on his rights." We will not countenance such a result here.

[Emphasis added].

Further, the instant ordinance being challenged on the basis of its validity and constitutionally provides criminal penalties for its violation. *Joy Management Co. v City of Detroit*, 183 Mich App 334, 455 NW2d 55 (1990) discussed the penal provisions relating to the point of sale ordinance:

The penalty provision in the Detroit Code, § 1-1-9, is made specifically applicable to the point-of-sale ordinance by § 26-3-10 of the ordinance. Section 1-1-9 is the general penalty provision that is to be applied to ordinance violations where no penalty provision is otherwise specified, and it provides for a fine of \$ 500 or imprisonment for up to ninety days, or both, for each offense.

Plaintiff-Appellant has been unable to find a case where a municipality has successfully asserted the defense of laches in a challenge to the validity and/or constitutionality of a non-zoning regulatory ordinance with penal provisions. To be time-barred from challenging the validity of an ordinance that carries fines and/or incarceration would be the epitome of injustice.

C. The Use of Zoning Ordinances in Support of a Defense of Laches is **Inapplicable** in the Instant Case.

The Defendant-Appellee cited cases involving zoning ordinances in support of the defense of laches against Plaintiff-Appellant. In the first case cited, *Edel v Filler Township*, 49 Mich

App 210; 211 NW2d 547 (1973), at page 5 of Defendant-Appellee/Cross-Appellant's Brief on Appeal in the Court of Appeals, it misquoted the case by stating: "[t]he Court of Appeals noted that when an ordinance had been the subject of public acquiescence and reliance for many years, the reasonableness of a belated challenge was open to question." The exact quote from the case is as follows: "[w]hen a zoning ordinance has been the subject of public acquiescence and reliance for this length of time, the reasonableness of a belated challenge is certainly open to question." [Emphasis added]. The fact that an old zoning ordinance was being challenged in the cited case is important because zoning ordinances are distinguishable from various other types of ordinances. Further the other two cases, Northville Area Non-Profit Housing Corp. v Walled Lake, 43 Mich App 424; 204 NW2d 274 (1972), and Richmond Township v Erbes, 195 Mich App 210; 489 NW2d 504 (1992), cited by Defendant-Appellee, were also zoning ordinances.

Explaining its holding of laches in relation to zoning ordinances, *Edel*, 49 Mich App 210, stated:

In the orderly process of handling real estate transactions where they are affected by provisions of zoning ordinances and amendments, it is essential that the members of the general public and the people buying or selling real estate must be able to rely on the validity of the public record, to-wit: a zoning ordinance and the zoning map issued in accordance with such zoning ordinance, without the necessity of poring over musty files and searching newspaper morgues, going back years in order to avoid a claim by other persons that there was a failure to comply with some technical requirement of law in the adoption of the ordinance in question. To hold otherwise would bring about chaotic conditions beyond all comprehension in the transfer and usage of real estate in any community having a zoning ordinance affecting such land. [Northville supra] 43 Mich. App. at 435--436, 204 N.W.2d at 280 (1972).

There the holding made sense. Zoning ordinances have to do with the issuance of building permits and other substantial matters dealing with building and improving property and use of land. They attempt to divide the city into districts and regulate the prescription and application of structural and architectural designs of buildings and the uses to which the buildings within the designated districts may be put. *See* "zoning" in <u>Black's Law Dictionary</u>, p. 1450, 5th edition. A

successful challenge to a zoning ordinance after many years may well destroy the purpose, plan and design of the neighborhood which was developed and grew under the zoning ordinance.

Yet, even zoning ordinances have been found invalid after long periods. In *Robyns v City* of *Dearborn*, 341 Mich 495; 67 NW2d 718 (1954), an action was brought **22 years** after the adoption of the particular zoning ordinance and the ordinance was found invalid as applied to plaintiffs' lots.

Zoning ordinances have been distinguished from regulatory ordinances with criminal penalties by Michigan Courts. *See Renne v Waterford Twp*, 73 Mich App 685, 690; 252 NW2d 842 (1977) and *Casco Twp v Brame Trucking Co., Inc*, 34 Mich App 466, 470-471; 191 NW2d 506 (1971). The City of Detroit in its charter also has distinguished zoning laws from other regulatory laws. The distinguishing sections are in Article 7 of the Charter and state:

Sec. 7-401 Duty Under Zoning Law.

The building department shall administer and enforce all laws, ordinances and regulations relating to the use of land ("zoning").

Sec. 7-404. Duty Under Other Regulatory Laws.

To the extent practicable, the department shall also administer and enforce all other laws and ordinances regulating the development, maintenance and use of real property in the city.

See Exhibit 10, Charter excerpts. How land is used is clearly distinguishable from a regulation that requires inspecting already existing houses. No alteration of the land itself or to the use to which the building is put in question.

The ordinance before the court is not a zoning ordinance that changes the purpose, plan, or design of the neighborhood. *Brand v Hartman*, 122 Mich App 326, 333; 332 NW2d 479 (1983), rev'd on other grounds, 422 Mich 883; 367 NW2d 67 (1985), cited approvingly in *Butcher v Detroit*, 131 Mich App 698; 347 NW2d 702 (1984) and *Butcher v Detroit*, 156 Mich App 165;

401 NW2d 260 (1986), fully explained and described the ordinance at issue in this case as follows:

The ordinance subject to scrutiny in this case is not a construction, housing, or health code. Not all of the dwellings in the City of Detroit are subject to its provision; it is not pervasive as to the quality or condition of Detroit housing; it concerns only one-and two-family residential structures at the time of sale or transfer. It is a pre-sale inspection ordinance which requires that an inspection report and certificate of approval be issued, for a reasonable fee, at sale or transfer except a sale or transfer by lease, mortgage, gift, devise, bequest or lien foreclosure. Although the list of inspection guidelines referred to in the ordinance is not a matter of record, it can only be assumed that such guidelines concern themselves with the objectives of a housing or health ordinance which would be enforceable at all times and not just at the time of sale or transfer.

This inspection ordinance is not of the essence of governing in any sense of the expression. Private persons or organizations could and regularly do inspect one-and two-family residential structures offered for sale or transfer to achieve a variety of objectives not the least of which is to determine the presence of termites. Further such pre-purchase housing inspections have historically been totally within the prerogative of the residential home buyer.

[Emphasis added]. It is clear that the ordinance would not change any existing neighborhood designs, plans or purposes. Thus, invalidation of the ordinance, even after 25 years as of this writing, because of lack of approved guidelines, would not affect the general plan of city districts and laches as a defense to the challenged ordinance on that basis should not be a consideration.

It is undisputed that there has been a lapse of more than 20 years before the challenge to the ordinance at issue appeared. However, for laches to be applicable as a defense to the challenge, more is necessary.

II. THE RECORD IN THIS CASE DOES NOT CONTAIN SUFFICIENT COMPETENT MATERIAL AND SUBSTANTIAL EVIDENCE TO JUSTIFY THE CONCLUSION OF THE COURT OF APPEALS THAT LACHES APPLIES BECAUSE APPELLEE WOULD BE SUBSTANTIALLY PREJUDICED IN DEFENDING A COMPLAINT REGARDING AN ORDINANCE THAT HAS BEEN IN EFFECT FOR MORE THAN 20 YEARS.

For one to successfully assert the defense of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense. *Matter of Crawford's Estate*, 115 Mich App 19; 320 NW2d 276 (1982). The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendants. *Sedger v Kinnco, Inc.*, 177 Mich App 69, 73: 441 NW2d 5 (1988). In determining whether a party is guilty of laches, each case must be determined on its own particular facts. *Id.* The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Badon v General Motors Corp.*, 188 Mich App 430, 436; 470 NW2d 436 (1991). "Laches" is an affirmative defense, and mere lapse of time without a showing of prejudice does not constitute laches. *Plasger v Leonard*, 316 Mich 174; 25 NW2d 156 (1947).

Further, accrual of a cause of action may be postponed until the plaintiff discovers the existence of the cause of action. A plaintiff's cause of action accrues when he discovers, or, through the exercise of reasonable diligence, should have discovered that he has a cause of action. Bonney v Upjohn, 129 Mich App 18, 24; 342 NW2d 551 (1983). Since there is a presumption that an ordinance is valid, Watnick v City of Detroit, 365 Mich 600; 113 NW2d 876 (1962), there was no reason to question the approval of the guidelines in the instant ordinance without research and the advice of an attorney to become aware that there may be an illegal or invalid ordinance. The issue of when a plaintiff discovers or through the exercise of reasonable

diligence should have discovered that he had a possible cause of action is a question of fact for the trier of fact to decide. *Bonney v Upjohn*, 129 Mich App 18; 342 NW2d 551 (1983). The Court of Appeals did not address this issue.

Based upon the above law, a challenge to the ordinance at issue is not untimely. It is acknowledged that there has been a lapse of time befpre bringing forth a challenge to the ordinance because of lack of approved inspection guidelines. But more than the passage of time is needed for lackes to apply. The Defendant must show that it has been prejudiced due to the delay.

A. The Court Of Appeals Opinion Does Not Make It Clear That Defendant-Appellee Suffered Non-Economic Prejudice On The Reasons Given By Defendant-Appellee And The Record Does Not Substantiate Said Reasons.

Defendant claims that it will suffer prejudice if the ordinance is declared ineffective or invalid after 23 years because:

- 1. The members of the City Council are different now then they were in 1976;
- 2. The task force which put together the rules and regulations has disappeared;
- 3. The Defendants would be prejudiced because they have conducted these inspections over such a long period of years.

(Appendix pp. 12a-13a). An examination of each stated reason of prejudice is most illuminating.

First, the fact that city council members in 1976 are different people than the current members has nothing to do with anything. Ordinances and statutes are amended all of the time with different legislators than those who enacted the original ordinance or statute. The current City Council should be highly insulted if, as it appears, the Defendant-Appellant is arguing that the present City Council members do not have the 'brains' necessary to approve the guidelines that allegedly have been in use. The City cannot possibly be prejudiced because a set of

lawmakers who originated an ordinance are no longer available. Such thinking implies that no ordinances, statutes, or federal codes can ever change because the originators of same differ with each election. That is nonsense.

Second, the fact that the task force that put together the rules and regulations has disappeared also is completely irrelevant. Current City Council can approve the guidelines without the task force, unless it thinks another task force should be formed to review and suggest amendments to the guidelines that should be used. The language of the instant ordinance is quite clear. It provides that the City Council must approve the guidelines to be used in inspection. It does not say a word about a task force. Again, the City cannot possibly be prejudiced because a set of advisors who put together some rules and regulations have disappeared. This implies that no other advisors can be found to assist the Council.

Third, the fact that the city has conducted these inspections over a long period of years is in no way prejudicial to the City. Lapse of time has previously been discussed in Argument I, supra. Prejudice with regard to this regulatory, non-zoning ordinance is not established merely because of age of the ordinance. The Court of Appeals concluded that "we have denied long delayed challenges to ordinances affecting real estate transactions because of public policy considerations." (Appendix p 28a). Relying upon Edel v Filer Township, 49 Mich App 210; 211 NW2d 547 (1973), which did not invalidate an approximately 18 year old zoning ordinance because of the township's failure to follow procedural requirements in enacting the ordinance, the Court of Appeals held that the same considerations are applicable in the instant case and the invalidation of the instant ordinance would, quoting *Edel*, "create 'chaotic conditions beyond all comprehension', Edel, supra, as all of those potential plaintiffs line up to sue defendant to recover the fees or fines they paid connected with the requirements of this ordinance." However, the complete quote from Edel at 29 Mich App 210, 216; 211 (Appendix p 28a). NW2d 547, is "[t]o hold otherwise would bring about chaotic conditions beyond all comprehension in the transfer and usage of real estate in any community having a zoning ordinance affecting such land." [Emphasis added]. The *Edel* court was clearly dealing with a zoning ordinance and not an ordinance, such as the instant ordinance, that would have no effect on the purpose, plan, or design of a neighborhood. If the ordinance is declared invalid, there is no harm to the houses to which it was applied.

If the City wishes to continue using the guidelines in existence, all the Defendant-Appellee needs to do is follow the dictates of its own ordinance and have the City Council approve the guidelines used in inspections. Refunding six years or more of illegal inspection fees exacted from citizen property owners under threat of criminal prosecution only puts a financial sanction on the city.

Enjoining any present or future prosecutions under the current ordinance is also not prejudicial to the City. The people under threat of criminal prosecution and possible confinement in jail are the ones prejudiced. The benefits, if any, to previous home buyers who had the inspections with unapproved guidelines would still be in effect.

B. The Court Of Appeals Erred In Finding Economic Prejudice To Defendant-Appellee Where There Was No Evidence In Support Of Such Claim Placed On The Record.

The next issue before this Court is whether a complaint is barred by laches because of financial prejudice when no supporting evidence has been presented either in the trial court or in the Court of Appeals that a refund of fees paid for the six years before the complaint was filed and a refund of fees paid after the complaint was initiated regarding a disputed ordinance would be inequitable and severely prejudicial to Defendant-Appellee and would create "chaotic conditions beyond all comprehension."

The Court of Appeals opinion, (Appendix p. 27a), stated that lack of due diligence or a long delay alone did not constitute laches, and that Defendant had to show that it was prejudiced by the delay or that allowing Plaintiff to pursue the claim would be inequitable. It then proceeded to find that prejudice to the Defendant was "clear" and Defendant-Appellant would

face untold damages through reimbursement of fees and fines to thousands of potential plaintiffs, going all the way back to 1976. (Appendix pp 27a to 28a).

As indicated earlier, the Court of Appeals stated that it had denied long delayed challenges to ordinances affecting real estate transactions because of public policy considerations and cited *Edel v Filer Township*, 49 Mich App 210; 211 NW2d 547 (1973), a case upholding a zoning ordinance that had been in effect for 18 years even though the township had failed to follow procedural requirements in enacting the ordinance. The Court of Appeals then concluded that:

Were this Court or the trial court to declare the ordinance invalid, defendant could face untold damages through reimbursement of fees to thousands of potential plaintiffs, including all of the home buyers or sellers who have sold or purchased property in the City of Detroit since 1976. It is apparent that allowing plaintiff to pursue its claim would be inequitable and severely prejudicial to defendant.

Defendant and presumably thousands of home buyers and sellers have relied on the validity of the ordinance. To now invalidate this ordinance would create 'chaotic conditions beyond all comprehension, *Edel, supra*, as all of those potential plaintiffs line up to sue defendant to recover the fees or fines they paid connected with the requirements of this ordinances. Therefore, we find no error in the trial court's conclusion that plaintiff's claim was barred by laches.

(Appendix p. 28a). The Court of Appeals was clearly focusing on the financial ramifications to the City of Detroit in arriving at its decision that laches applies. However, the financial reasoning of the Court was erroneous for two major reasons.

First, apparently the Court of Appeals thought that fees would be recoverable all the way back to 1976 when the ordinance was passed and did not consider that reimbursement of fees would be barred by the statute of limitations of six years for personal actions. See MCLA 600.5813; MSA 27A.5813. Thus, collections of fees could only be made from 1992 to the date that the ordinance is declared invalid, since the suit was brought in 1998. No fees collected before 1992 could be refunded.

Second, in order to justify the application of laches because of financial prejudice, there must be proof presented explaining any alleged financial prejudice. In 27A Am Jur

2d, Equity, § 192, p. 669, on the issue of laches because of financial prejudice, it is stated that "[a]s with proving evidentiary or defense prejudice, evidence must be presented explaining any alleged financial prejudice. . . . Courts thus require more than mere hypothetical and unlikely financial harm." Here, however, the record is completely void of any evidence of financial prejudice or harm.

At the Court of Appeals argument, Defendant-Appellee only orally argued that it would be financially prejudiced if it had to refund fees. However, the record is devoid of any evidence of how much would have to be refunded or how it would impact the city adversely. The trial court arguments and Defendant-Appellee's brief for the grant of summary disposition to Appellee City also did not contain any evidence in support of financial prejudice. The amount of money that could be refunded if the ordinance were declared invalid is available from the City of Detroit for the years 1992 to the present but was not presented as evidence in either the trial court or the Court of Appeals. Despite the lack of record evidence of financial prejudice, this supposed financial prejudice was the hook upon which the Court of Appeals hung it opinion. Thus, the Court's conclusion was totally speculative and hypothetical², such that laches should not apply as the record now stands.

Finally, the Court of Appeals appeared to ignore the fact that the action had been certified as a class action because it spoke of all the potential plaintiffs lined up to sue Defendant-Appellee for recovery of fees if the ordinance were declared invalid. However, because the action had been certified as a class action, the likelihood of individual suits against Defendant-Appellee was minimized. The individual financial burden of suing for a few inspection fees would generally far outweigh any perceived disadvantage of retaining membership in the class.

It is interesting to note that in *Butcher v Detroit*, 131 Mich App 698; 347 NW2d 702 (1984) and *Butcher v Detroit*, 156 Mich App 165; 401 NW2d 260 (1986), cases involving a different challenge to the same Ordinance 124-H, the actions were class actions that sought a refund of fees from 1982 when the action was filed back to 1976 when the ordinance in question was passed. Neither panel of the Court of Appeals mentioned that the refunds would create "chaotic conditions beyond all comprehension." The instant suit merely covers a different six-year period.

Indeed, it is unlikely that all previous home sellers subjected to the ordinance at issue would attempt recovery of their inspection fees. The City would surely request documentary evidence of sale and payment of the fees for a refund. For older sales, such documents may not be readily assessable. Further, other poential plaintiffs will not bothe with pursuing their claim or may not be available to pursue it. Thus, all fees collected by the City are not likely to be refunded, such that the impact upon the City Treasury would be less than the actual fees collected.

CONCLUSION

Plaintiff-Appellant asserts that the decision of the Court of Appeals was clearly erroneous and conflicts with earlier Supreme Court decisions and other decisions of the Court of Appeals as they relate to the issue of the defense of laches for summary disposition. The Court of Appeals found that the Defendant-Appellee City of Detroit would be prejudiced, and in particular, financially prejudiced, if Ordinance 124-H were to be invalidated. The Court of Appeals finding of non-economic prejudice was unclear in terms of substantiation. It was totally erroneous in its finding of economic prejudice because the record of both the trial court and the Court of Appeals was devoid of any financial evidence relating to the case.

This Court, in *Lothian v City of Detroit*, 414 Mich 160; 324 NW2d 9 (1982), addressed the issue of laches. It said:

As a general rule, "[where] the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot * * * be recognized." Walker v Schultz, 175 Mich 280, 293; 141 NW 543 (1913).

Here, Defendant City offered no proof of a material change in circumstances. None of Defendant's reasons for prejudice show a change in condition that would make it inequitable to enforce the claim against the Defendant. The only inequity here is permitting the City to continue to operate against its own rules to the detriment of its citizens, who, under threat of

incarceration or fine, are forced to obey an ordinance, the most important part of which has not

been approved by the City Council as required.

Laches simply is not a defense to this non-zoning ordinance because the City did not

show prejudice if the ordinance is declared illegal or ineffective. Such decision, if allowed to

stand, changes the status of the law related to laches in the state of Michigan.

Because both the trial court and the Court of Appeals held that laches barred Plaintiff's

complaint, the question of the validity of the ordinance under the guidelines issue was not

addressed and cannot be reviewed by this Honorable Court. Likewise, the issues of refunds of

payments made under duress, i.e., threat of prosecution for violation of a misdemeanor, and

injunctions against future prosecutions under the ordinance were not reached. These questions,

however, have a substantial impact on the jurisprudence of the city and state if the current Court

of Appeals decision is overruled and would certainly be raised at the appropriate time.

RELIEF REQUESTED

Plaintiff-Appellant respectfully requests that this Honorable Court reverse the decision of

laches issued by the Court of Appeals and remand the matter for further proceedings.

Alternatively, Plaintiff-Appellant asks that the matter be remanded to the Court of Appeals or the

trial court for an evidentiary hearing on the issue of financial prejudice to the City of Detroit.

Date: May 10, 2003

Respectfully submitted

Veleta P. Brooks-Burkett

Attorney for Plaintiff-Appellant

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Detroit, Michigan 48207-3810 313/259-3197

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ORDINANCE NO. 124-H (Corrected Copy) CHAPTER 12

RESTRICTION ON SALES OR CONVEYANCE OF ONE OB TWO FAMILY DWELLINGS

AN ORDINANCE to amend chapter 12 of the Code of the City of Detroit by adding a new Article; to be known as Article; To prohibiting the sale or conveyance of one (4) or two (2) family dwellings without either a Certificate of Approval belies and Safety Engineering Deparriment, a Walver of Compliance an Affidavit of Non-Occupancy beling sworn to by the purchaser or ing sworn to by the purchaser or ing sworn to by the purchaser.

IT IS HEREELY ORDAINED BY THE Section 1. That Chapter 12 of amended by adding a new Article to be known as Article 7, Restriction on Two (2) Family Dwellings.

Bection 12-7-1. For the purpose of this erticle.

this article;

(a) Department means the Build-ings and Safety Engineering Depart-

(b) Dwelling means a lor 2 family tesidential structure.

(c) Investment Property means any dwelling, except (l) a dwelling held of Pederal Government.

(2) A dwelling which has been occupied in transferor for a 6 consecutive month prior to the sale or transfer means to consecutive mouth prior to the sale or transfer.

(d) Sale or Transfer means to convey any interest in a dwelling exception way any interest in a dwelling exception to the sale or transfer shall be deemed to occur upon the transfer of title. The sale or transfer shall be deemed to occur inton of a land contract, or the exerction of a land contract.

Section 12-7-2. It shall be unlawful for sell or transfer, or act as a broker or transfer of a dwelling unless:

(a) A valid certificate of approval is tendered to the purchaser or trans. feree at the time of the sale or trans.

burpose of occupancy by the purchaser of a dwelling which is not held by the seller or transferer as an investment property or held by a governmental agency and (1) the purchaser or transferer at ealer or transferer at the purchaser or transfere at least 10 days prior to the sale or transfer at the purchaser or transfere at least 10 days prior to the sale or transfer a valid inspection report; and (2) the parties execute a walver of tender of

ance with the provisions of this ordi certificate of approval in

dwelling which is a sale or transfer of a dwelling which is not to be occupied the purchaser or transferee and by sworn affidavit (1) that he will dwelling, (2) that the will dwelling, (3) that the him and he will never be occupied by any person to occupy the property of approval, except occupied by without first obtaining a certificate time of the sale or transfer may be continued but in no case for a period required rehabilitation permit will be obtained; or transfer of a dwelling by a sovernmental agency transfere and the purchaser or transfer to be occupied by the purchaser or transfere has received at least 10 days a valid inspection report and certifies occupy or allow the dwelling to be first obtaining a certificate of approvel or a temporary occupancy permit.

Section 12-7-3. The provisions of this ordinance shall not apply to (1) mental agency to another; (2) a sale or transfer by one governor transfer to a purchaser or transfer to a purchaser or transfer to a purchaser or transfer is 12 months immediately prior to the sale or transfer. Browthed the the exercise of an option held by the exercise of an option held by or transfer which has occured brior nance; or (4) a sale or transferer; (3) a sale or transfer which has occured prior nance; or (4) a sale or transfer where the seller or transferor and the purchase agreement prior to the effective date of this ordinance. Section 12-7-4. The department only after it has inspected the dwelfing and found it conforms with the guidelines described in Section 13-7-6. Section 12-7-2 shall be lasted only after the department has inspected for in settled in Section 12-7-7. Shall be lasted only after the department has inspected for inspection or inspection reports shall be accided in Section 12-7-6. Applications for certificates of approval or inspection reports shall be available at the department or other designated agencies and shall be parament. The department shall be parament shall set reasonable fees

for inspections made pursuant to this

Section 12-7-5. A certificate of approval or inspection report shall be valid for a months from the date of

for which a certificate or report is issued that was occupied at the time of Issuance. The certificate or report shall be valid during the period of continuous occupancy, but not to exceed 24 months. A certificate of approval is not a warranty or guarantee that there are no defects in the dwelling nor shall the city be held responsible for defects not noted in Section 12-7-6. The department Section 12-7-6. The department shall prepare a list of inspection guidelines to be used in inspection relating to the enforcement of this article. The guidelines shall constitute the complete scope of repairs required for the issuance of the certificate or to be noted in an inspection report. The guidelines shall not be effective until approved by City Council. The inspection guidelines shall not be effective made available free of charge to the general public. The city shall notify the general public. The city shall notify the general public. The city shall recommend by resolution available. available.

Section 12-7-7. A waiver of tender of a certificate of approval a. provided in Section 12-7-2(b) or an affidavit as provided in Section 12-7-2(c) or 12-7-3(d) shall only be obtainable from the department or other designated city agencies and shall only be executed by the sellor or transferer and the purchaser or transfere at the department after the inspection report has been reviewed with the purchaser or transferee by a representant with the department A signed copy of all waivers and affidavits shall be filed with the department at the time of execution.

Section 12-7-8. Should the department, upon inspection, determine that there are conditions which constitute an immlinent danger to health and safety it may order the conditions to be remedied and may limit

or prohibit occupancy where appropriate. In all other cases the department shall not penalize any person for any deficiencies discovered in the dwellings as a result of an inapection conducted in accordance with this ordinance whether the sale or transfer does, or does not, occur except as occupancy is restricted in Sections 12-7-2(c) arfd 12-7-2(d).

Section 12-7-9. The City Council shall establish an advisory committee composed of eleven (11) city residents to review the operation of the ordinance, rules, regulations and standance, rules, regulations and standance and evaluate complaints in the implementation, and to reconnent to City council changes in this ordinance and the adoption of rules, regulations and standards. The advisory committee shall consist of two (2) members from the department, three (3) from the real estate industry and six (6) members at the pleasure of City Council and vacancies shall be filled by City Section 12-7-10. Any sale or transfer in violation of this ordinance enal to adhere to statements, made in the waiver of compliance or any failure of adoption 12-7-2(b) or the affidevite provided for in Sections 12-7-2(c) and 12-7-2(d) and 12-7-2(d) and 12-7-2(d) and 12-7-11. A penalty or common law right or account of compliance in the ordinance shall not limit or mon law right or account.

mon law right or action. Section 2. This ordinance is hereby given effect on June 30, 1976.

(JCC P. 666-69, March 19, 1976)
Passed June 9, 1976.
Approved June 22, 1976.
Published June 25, 1976.
Effective June 30, 1976.
Re-published: July 16, 1976
JAMES H. BRADLEY City Clerk

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ORDINANCE NO. 213-H CHAPTER 12 ARTICLE 7 AMENDMENT TO ALL SALES ORDINANCE 121.H

AN ORDINANCE to amend Chapter 12. Article 7 of the Code of the City of Detroit, Michigan, as amended, by amending Sections 12-7-1, 12-7-2, 12-7-4, 12-7-7 and 12-7-10, to exempt dwellings held by the County from the definition of investment property, to permit a temporary occupancy not to exceed six months for sales to investors, to permit the issuance of a certificate of approval when an amount equal to twice the cost of repair is placed in escrow, to add a requirement that sellers, transferors and occupants be advised that they have a right to refuse inspections without a search warrant, to permit the execution of an investor affidavit to occur at places other than the Department, to add an implied warranty for sales or transfers in violation of Chapter 12, Article 7 and to clarify the penalty for violations.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Chapter 12. Article 7 of the Code of the City of Detroit, be amended by amending Sections 12-7-1, 12-7-2, 12-7-4, 12-7-7 and 12-7-10 to read as follows:

Section 12-7-1

For the purpose of this article: (a) Department means the Buildings:

and Safety Engineering Department. (b) Dwelling means a 1 or 2 family

residential structure.

(c) Investment Property means any dwelling, except (1) a dwelling held by an agency of the City, County, State or Federal Government. (2) a dwelling which has been occupied in whole or in part by the seller or transferor for a 8 consecutive month period within 1 year immediately prior to the sale or transfer. (3) a dwelling held by an estate.

(d) Sale or Transfer means to convey any interest in a dwelling except by lease, mortgage, gift, device, bequest or lien foreclosure. The sale or transfer shall be deemed to occur upon the transfer of title, the execution of a land contract, or the exercise of an option to

purchase a dwelling.

Section 12.7.2

It shall be unlawful to sell or transfer, or act as a proker for a sale or transfer of a dwelling unless:

a) A valid certificate of approval is tendered to the purchaser or transferee at the time of the sale or transfer:

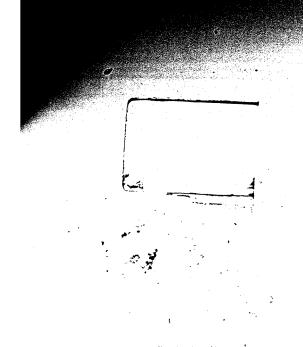
(b) It is a sale or transfer for the purpose of occupancy by the purchaser of a dwelling which is not held by the seller or transferor as an investment property or held by a governmental agency and (1) the seller or transferor delivers to the purchaser or transferee at least 10 days prior to the sale or transfer a valid inspection report; and (2) the parties execute a waiver of a TENDER OF a certificate of approval in accordance with the provi-sions of this article or (c) It is a sale or transfer of a dwel-

ling which is not to be occupied by the purchaser or transferee and the purchaser or transferee certifys by sworn affidavit (1) that he will repair the dwelling; (2) that the dwelling will never be occupied by him and he will not rent nor allow any person to occupy the property without first obtaining a certificate of approval or a temporary occupancy permit, which shall not exceed six (6) months and may be obtained upon inspection and the absence of any hazardous conditions, except occupancy at the time of the sale or transfer may be continued but in no case for a period longer than 12 months: and (3) the required rehabilitation per-

mit will be obtained; or (d) It is a sale or transfer of a dwelling by a governmental agency to be occupied by the purchaser or transferee and the purchaser or transferee has received at least 10 days prior to sale or transfer a copy of a valid inspection report and certifys by sworn affidavit that he will not occupy or allow the dwelling to be rented or otherwise occupied without first obtaining a certificate of approval or a temporary managemency permit.

Section 12-7-4

The department shall issue a certificate of approval only after it has inspected the dwelling and found it conforms with the guidelines described in Section 12-7-6; provided that, in the absence of any hazardous conditions a certificate may be issued when an amount of money equal to twice the estimated cost of required repairs is



placed in escrow pursuant to departmental guidelines, the certificate to be annotated to indicate this basis for issuance. The inspection report provided for in Section 12-7-2 shall be issued only after the department has inspected the dwelling, and shall note any deficiencies from the guidelines described in Section 12-7-5.

Applications for certificates of approval or inspection reports shall be available at the department or other designated agencies and shall be filed with the department. The department shall set reasonable fees for inspections made pursuant to this ordinance.

The department shall advise the seller, transferor or the occupant of a dwelling which must be inspected pursuant to the provisions of this ordinance that he or she has the right to refuse entry to the department without a search warrant.

Section 12-7-7

A waiver of tender of a certificate of approval as provided in Section 12-7-2(b) or an affidavit as provided in Section 12-7-2(c) or 12-7-2(d) shall only be obtainable from the department or other designated city agencies, and shall only be executed by the seller or transferor and the purchaser or transferor and the purchaser or transfere in the presence of a representative of the department after any inspection report, waiver of affidavit has been reviewed with the purchaser or transfered by the representative of the department; provided that, any purchaser or transferee executing an affidavit under

section 12-7-2(c) need not execute same in the presence of a representative of the department if the purchaser of transferee has executed such an affidavit in the presence of a representative of the department in the previous 12 months. A signed copy of all waivers and affidavits shall be filed with the department

Section 12-7-10

In any sale or transfer in violation of this article, the seller or transferor shall be deemed to warrant that the dwelling conforms with the inspection guidelines promulgated pursuant to section 12-7-8. Any person, being owner or agent, who sells or transfers a dwelling in violation of this article or any failure to adhere to statements made in the waiver of compliance form provided for in Section 12-7-2(b) or in the affidavits provided for in Section 12-7-2(c) and 12-7-2(d) shall be subject to the penalty provided for in section 1-1-7 of this code.

Section 2. All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

Section 3. This ordinance is hereby given immediate effect.

(JCC p. 2115-17. October 5, 1977) Passed: November 16, 1977 Approved: November 25, 1977 Published: December 2, 1977 Effective: December 2, 1977

JAMES H BRADLEY City Clerk * _{* •}

ment of buildings and safety engineering may have reasonable cause to believe are in violation of any of the requirements of the building code of the city or the housing law of the state.

Dwelling units shall mean an apartment or living quarters, including facilities for cooking, for the use of one person or two (2) or more persons living together as a family. (Code 1964, § 12-3-1)

Cross reference—Definitions and rules of construction generally, § 1-1-2.

Sec. 26-2-2. Inspections.

The department of buildings and safety engineering shall make such inspections of buildings occupied or intended to be occupied for dwelling purposes within the purview of this article as may be necessary to insure the compliance of such buildings with the provisions of the building code of the city, the housing law of the state and other applicable laws and ordinances regulating the maintenance, occupancy and use of dwellings. (Code 1964, § 12-3-2)

Sec. 26-2-3. Enforcement.

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For the purpose of this article, the director of the department of buildings and safety engineering is hereby authorized and it shall be his duty to enforce all the laws, ordinances and regulations appertaining to such buildings as come within the purview of this article, and the public health director and the fire marshal shall collaborate with the director of the department of buildings and safety engineering in the observance of this requirement and shall furnish all necessary supervisory assistance. Nothing in this article shall be construed to abrogate the concurrent authority of the public health director and the fire marshal with the director of the department of buildings and safety engineering in matters pertaining to the construction and maintenance of buildings and fire prevention under the housing law of the state. (Code 1964, § 12-3-3)

Sec. 26-2-4. Appropriations.

The city council shall appropriate such sums of money as may be necessary to enable the department of buildings and safety engineering to perform the duties imposed by this article. (Code 1964, § 12-3-4)

ARTICLE III. SALES OR CONVEYANCES OF ONE- OR TWO-FAMILY DWELLINGS

Sec. 26-3-1. Definitions.

For the purpose of this article:

Dwelling means a one- or two-family residential structure.

Investment property means any dwelling, except:

- (1) A dwelling held by an agency of the city, county, state or federal government;
- (2) A dwelling which has been occupied in whole or in part by the seller or transferor for a six (6) consecutive month period within one year immediately prior to the sale or transfer;
- (3) A dwelling held by an estate.

Sale or transfer means to convey any interest in a dwelling except by lease, mortgage, gift, device, bequest or lien foreclosure. The sale or transfer shall be deemed to occur upon the transfer of title, the execution of a land contract, or the exercise of an option to purchase a dwelling. (Code 1964, § 12-7-1)

Cross reference—Definitions and rules of construction generally, § 1-1-2.

Sec. 26-3-2. Conditions required.

It shall be unlawful to sell or transfer, or act as a broker for a sale or transfer, of a dwelling unless:

(1) A valid certificate of approval is tendered to the purchaser or transferee at the time of the sale or transfer; or



§ 26-3-2

DETROIT CODE

- (2) It is a sale or transfer for the purpose of occupancy by the purchaser of a dwelling which is not held by the seller or transferor as an investment property or held by a governmental agency and the seller or transferor delivers to the purchaser or transferee at least ten (10) days prior to the sale or transfer a valid inspection report; and the parties execute a waiver of a tender of a certificate of approval in accordance with the provisions of this article; or
- (3) It is a sale or transfer of a dwelling which is not to be occupied by the purchaser or transferee and the purchaser or transferee certifies by sworn affidavit that he will repair the dwelling; that the dwelling will never be occupied by him and he will not rent nor allow any person to occupy the property without first obtaining a certificate of approval or a temporary occupancy permit, which shall not exceed six (6) months and may be obtained upon inspection and the absence of any hazardous conditions, except occupancy at the time of the sale or transfer may be continued but in no case for a period longer than twelve (12) months; and the required rehabilitation permit will be obtained; or
- (4) It is a sale or transfer of a dwelling by a governmental agency to be occupied by the purchaser or transferee and the purchaser or transferee has received at least ten (10) days prior to sale or transfer a copy of a valid inspection report and certifies by sworn affidavit that he will not occupy or allow the dwelling to be rented or otherwise occupied without first obtaining a certificate of approval or a temporary occupancy permit. (Code 1964, § 12-7-2)

Sec. 26-3-3. Exemptions.

The provisions of this article shall not apply to:

(1) A sale or transfer by one governmental agency to another;

- (2) A sale or transfer to a purchaser or transferee who has occupied the property at least twelve (12) months immediately prior to the sale or transfer; provided, the sale or transfer is not pursuant to the exercise of an option held by the seller or transferor:
- (3) A sale or transfer which has occurred prior to the effective date of this article; or
- (4) A sale or transfer where the seller or transferor and the purchaser or transferee have signed a purchase agreement prior to the effective date of this article. (Code 1964, § 12-7-3)

Sec. 26-3-4. Issuance of certificate of approval and inspection reports; inspection fees.

- (a) The department shall issue a certificate of approval only after it has inspected the dwelling and found it conforms with the guidelines described in section 26-3-6; provided, that in the absence of any hazardous conditions a certificate may be issued when an amount of money equal to twice the estimated cost of required repairs is placed in escrow pursuant to departmental guidelines, the certificate to be annotated to indicate this basis for issuance. The inspection report provided for in section 26-3-2 shall be issued only after the department has inspected the dwelling, and shall note any deficiencies from the guidelines described in section 26-3-6.
- (b) Applications for certificates of approval or inspection reports shall be available at the department or other designated agencies and shall be filed with the department. The department shall set reasonable fees for inspections made pursuant to this article.
- (c) The department shall advise the seller, transferor or the occupant of a dwelling which must be inspected pursuant to the provisions of this article that he has the right to refuse entry to the department without a search warrant. (Code 1964, § 12-7-4)

APPENDIX A-3

HOUSING



Sec. 26-3-5. Validity of certificate and report; responsibility of city for defects.

A certificate of approval or inspection report shall be valid for six (6) months from the date of issuance, except for any dwelling for which a certificate or report is issued that was occupied at the time of issuance. The certificate or report shall be valid during the period of continuous occupancy, but not to exceed twenty-four (24) months. A certificate of approval is not a warranty or guarantee that there are no defects in the dwelling, nor shall the city be held responsible for defects not noted in the inspection report. (Code 1964, § 12-7-5)

Sec. 26-3-6. Inspection guidelines.

The department shall prepare a list of inspection guidelines to be used in inspection relating to the enforcement of this article. The guidelines shall constitute the complete scope of repairs required for the issuance of the certificate or to be noted in an inspection report. The guidelines shall not be effective until approved by city council. The inspection guidelines shall be issued to the applicant for certificate of approval or inspection report and made available free of charge to the general public. The city shall notify the general public, as the city council shall recommend by resolution that the guidelines exist and are available. (Code 1964, § 12-7-6)

Sec. 26-3-7. Waiver of tender and affidavits generally.

A waiver of tender of a certificate of approval as provided section 26-3-2(2) or an affidavit as provided in section 26-3-2(3) or 26-3-2(4) shall only be obtainable from the department or other designated city agencies, and shall only be executed by the seller or transferor and the purchaser or transferee in the presence of a representative of the department after any inspection report, waiver of affidavit has been reviewed with the purchaser or transferee by the representative of the department; provided that, any pursupp. No. 1

chaser or transferee executing an affidavit under section 26-3-2(3) need not execute same in the presence of a representative of the department if the purchaser or transferee has executed such an affidavit in the presence of a representative of the department in the previous twelve (12) months. A signed copy of all waivers and affidavits shall be filed with the department. (Code 1964, § 12-7-7)

Sec. 26-3-8. Dangerous conditions and deficiencies found in dwellings.

Should the department, upon inspection, determine that there are conditions which constitute an imminent danger to health and safety it may order the conditions to be remedied and may limit or prohibit occupancy where appropriate. In all other cases the department shall not penalize any person for any deficiencies discovered in the dwellings as a result of an inspection conducted in accordance with this article whether the sale or transfer does or does not occur, except as occupancy is restricted in sections 26-3-2(3) and 26-3-2(4). (Code 1964, § 12-7-8)

Sec. 26-3-9. Advisory committee.

The city council shall establish an advisory committee composed of eleven (11) city residents to review the operation of this article and rules, regulations and standards adopted pursuant thereto; to hear and evaluate complaints in its implementation; and to recommend to city council changes in this article and the adoption of rules, regulations and standards. The advisory committee shall consist of two (2) members from the department, three (3) from the real estate industry and six (6) members at large. Members of the committee shall serve at the pleasure of city council and vacancies shall be filled by city council. (Code 1964, § 12-7-9)

Sec. 26-8-10. Violations.

In any sale or transfer in violation of this article, the seller or transferor shall be deemed to warrant that the dwelling con-

forms with the inspection guidelines promulgated pursuant to section 26-3-6. Any person, being owner or agent, who sells or transfers a dwelling in violation of this article or any failure to adhere to statements made in the waiver of compliance form provided for in section 26-3-2(2) or in the affidavits provided for in sections 26-3-2(3) and 26-3-2(4) shall be subject to the penalty provided for in section 1-1-9. (Code 1964, § 12-7-10)

Sec. 26-3-11. Penalties.

A penalty created by this article shall not limit or derogate any other statutory or common law right or action. (Code 1964, § 12-7-11)

ARTICLE IV. RENTAL AGENCIES

Sec. 26-4-1. Defined.

For the purpose of this article, a rental agency is defined as the operation of any business whereby any person, for the payment of a fee in advance thereof or any portion of such fee, solicits, offers or attempts to procure any living quarters for any person for the purpose of the rental thereof or who assists or in any manner causes the same to be done. (Code 1964, § 52-1-1)

Cross reference—Definitions and rules of construction generally, § 1-1-2.

Sec. 26-4-2. License required.

No person shall operate a rental agency in the city without first obtaining a license from the city. (Code 1964, § 52-1-2)

Cross reference—Licenses generally, Ch. 30.

Sec. 26-4-2.5. Fee; term.

A license to operate a rental agency or conduct a rental agency business within the city shall issue upon the payment of an annual license application fee pursuant to chapter 30 of this Code. The licenses covered by this chapter shall be for one calendar year or any portion thereof. (Ord. No. 500-H, § 1, 5-5-82)

Editor's note—Inclusion of a portion of Ord. No. 500-H amendatory of Code 1964 § 52-1-3 as § 26-4-2.5 hereof has been at the discretion of the editor.

Supp. No. 1

Sec. 26-4-3. Insurance or bonds required.

Every licensee under this article shall file contracts of insurance or indemnity bonds running to the people of the city, approved by the corporation counsel, for each principal place of business, in the sum of five thousand dollars (\$5,000.00), conditioned that the licensee will pay any refund due an applicant who is entitled to a refund. (Code 1964, § 52-1-7)

Sec. 26-4-4. Execution of agreements.

A rental agency shall execute, upon payment of a fee in advance, an agreement in triplicate; one copy to be retained by the agency, one to be delivered to the applicant, and one copy to be forwarded to the consumer affairs department. The agreement shall state the type of housing desired, the area requested and the rent the applicant is able to pay. The agreement shall contain the provisions of this article relating to refunds verbatim, in larger type than the general provisions of the agreement. (Code 1964, § 52-1-5)

Sec. 26-4-5. Refund of fees paid to agencies.

The rental agency shall refund to the applicant the fee paid in advance, when the agency shall be unable to secure accommodations for the applicant or the applicant is unable to secure similar accommodations by his own efforts thirty (30) days from the date of the agreement. (Code 1964, § 52-1-6)

ARTICLE V. HOUSING CODE

Sec. 26-5-1. Scope.

(a) The provisions of this article shall apply to all classes of dwellings defined in article 2 of the official building code of the city and in the following sections; except that in sections where specific reference is made to one (1) or more specific classes of dwellings, such provisions shall apply only to those classes to which such specific reference is made. All



(Street Address), and (Governmental Agency) has not ten on application for an impection must dered to me for the subject real by filed along with the application fee issued by the Buildings and Safety (ith the Buildings and Safety Engineering Department of the City Engineering Department of the ings and Salety Engineering Department describing what deficiencies must be corrected before a Certificate (Date) I received from II. The dwelling will be inspected spection Report issued by the Build-condition, inside and out, as well as lings and Safety Engineering Depart-the adequaty and condition of the estate located at (Governmental Agency) certain real

Witnessed: (Notary)

Name of Purchaser or Transferee Address of

Tel. No. of Purchaser of Transferee IV. The owner of a responsible Name of Departmental Representative likes at the time of inspection, unless other arrangements have been made Departmental Representa-

Received and placed 8

Engineering Department Buildings and Safety June 8, 1976

Honorable City Council: An Ordinance to amend Chapter 12, to regulate the sale of one and two-family cwellings.

previously approved by your Honorsche Body and are presently used in These Rules and Regulations were implementation Ordinance

Respectfully submitted, CREIGHTON C. LEDERER

POR DWELLINGS REQUIRING AN INSPECTION REPORT OR A CERTIFICATE OF APPROVAL FOR SALE OR CONTINEVANCE RULES AND REGULATIONS Director

> Certificate of Approval is required for the sale of conveyance of a dwelling I. When an inspection Report

must be corrected before a Certificate plumbing and sanitary facilities, and understand the items listed on that report, and (3) I myself will not occupy, nor will I allow anyone electrical service. This inspection is not occupy, the above property without first obtaining from the Buildings and Safety Engineering. It is Buildings and Safety Engineering to a temporary occupancy permit.

I understand that the City of Defects which are noted in the Inspection, all those defects other than those defects other than those defects other than those described in the Inspection. I understand I an subject to prothe adequaty and condition of heating system, the condition

I understand I am subject to pro- inspection. Excluding chimney cleanif I do not adhere to the statements Inaccessability to hispectional areas,
I have sworn or affirmed above. Inoperable ecuipment and premature
Subscribed and Sworn before me scheduling a reinspection for additional fees. A minimum of three urchaser or Transferee inspection are required for processing Purchaser or Transferee to the owner or an authorized representative of the owner. before me scheduling a reinspection for 19 corrected desciencies will delay the inspection procedures and result in

Buildings and Safety Engineering in advance for an unoccupied build. V. Representatives from

relating to the insplementation of the certification requirement.
RULES Enclosed berewith is a copy of the are code requirements and have an recommended inspection. Rules and effect on the safety of occupants of a Regulations to be used in inspections duelling may be included as a effect on the safety of occupants of a dwelling may be included as a

STRUCTURAL AND MECHANICAL CORRECTIONS NECESSARY FO

prior to issuance of a Certificate mechanical defects must be reprized Approval following structural

Engineering Department will inspect prior to sale or transfer a one or two Buildings pus Safets

> BUILDING EXTERIOR: SSUECTO THE OWNER. Certificate Chimbey <u>£</u>

reinspection of corrected deficiencies, NOTE: Items not specified which ailowed Department will inspect the dwelling for possible deficiencies as specified on the attached Inspection Check Lists. One (1) working day must be allowed for scheduling the

SECURING

A CERTIFICATE OF APPROVAL

Inspection Report which shall differences found as a result of the inspection will be noted in an described herein; provided Approval

Rocing -sections missing, roof leaks -- cose cracked missing mason; -lose of missing chimney cap

-flushing rusted ugnordi

Windows

Doors -Broken Jeaks offective looking hardware.

-rotted, broken

decking floor joists,

-roited. Steps loose. broken

Stringers, handrails, -bu)ged WAlls

Weed trim -evidence of leaks -scaling paint (lead base)

Scaling paint (lead base)
BUILDING INTERIOR:

-eridence of intestation (requires

Septem -cverfusing of circuits, feeders or installed -coids used in lieu of permanent storm drainage system.)

system in order to provide light, heat or power -illegal extensions to MILIPE

receptacles in bathroom (one), bedroom (two), dining room (two), kitche: (three), living room (four), -less than minimum number of -rot reptacles in bathroom (one), siding electrical overlotad

follet room, bathroom, baundry room, -- lack of therable laundry outlet on safety.

bus.

—Rils and sills rotted, broken

Perch

-piers out of plumb.

treads.

-loose, broken, rotted, missing -siding missing FACILITIES

—steeping rooms in cellar or artic —unsan —damaged, broken cracked rotted which pro missing columns, beams, joists, and grens. -loose, missing, spalling plaster

studes rafters

--briken, missing, loose handralls evidence of leaks in cellar.
RODENT AND VERMIN -broken, cracked, loose stair treads

ELECTRICAL SYSTEM: INFESTATION

service

Turnace room, hall recreation room (two) reber (three) living room (four),—scaling paint ilead base), creation room (two)

The Department reserves the right clark of operable light fixture (b) to include in the Inspection Report.

H The HEATING AND VENT SYSTEM opening -- obstructed tight-fitting, chimney cleanout

cleanout door in chimney connectors and chimney connectors

--unused openings in chimney chimney connectors palsur defective connectors and operable

Infrace --- combustible improperly adjusted pilot flame mater;at near

--main gas supply to ourner not shut off by safety pilot within three minutes after pilot flame to extinguished beauty scale, dirt, and carbon and main burner flame

furnace flue passages deposits in combustion chamber and -leaks in steam and het water

fuel lines) equipment (remove and properly heating system and electrical equipment

unvented spi space-heating spicy valves

beating all habitable areas -beating s):stem incapable of

PLUNBING -disconnected duct work. SANITARY

temperature-pressure relief valve on temperature-pressure relief valve on water heater. (Relief valves must have height light, and ventilation)

—steeping room. pressure relief valve or combustion connected to chimner flue; no --- leaking water or waste piping or plugged drains, defective faunets

which provide lodging place for filth -cracked or broken fixtures

cleanout plugs qui bathtub with shower and wall around -missing floor drain strainers and -open joint between buil₹-in

(Sform water from roof of dwelling shall be drained to underground -illegally defective gutters and downspouts g.itd.cauld and, or (Required incorrectly

requirements.) GARAGES, SHEDS

reasonably conform to Plumbing Code

-totted, broken, -leaking roof -rotted, broken studs, raiters loose, missing

any condition not described herein which may be a hazard to health

an independent circuit

—lack of general illumination in and Safety Engineering Department is basement

not responsible for defects not

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Approval かいりょうかいもの neceived and placed on file. 5 no: watrabty

Taken from the Table

to take from the table at the City of Detibit by adding berian a Buttelings and Approval being issued therefor by the Department of a wainer וויסתונים prohibiting DATING TAN Council Member Rendersen to being executed by the purchaser (1) or two (2) family dwellings 3 5 Chapter 12 of the Code either the sale or conveyance of 178-179), which table February SELET. Certificate as Article Engineering of Compli-Ordinance motion payote # 1)64. Ç

which motion pretailed as council Neuman per line postponed, ordinance to indefinitely postponed, ordinance to indefinitely postponed. Council Member Benderson Yeas - Council Members Cieveland, gell and President Levin mored

Taken from the Table

Ordushice, w lessofication where an Alliestication is presently sh properties located on the west side irem. 気のの ず District 1944 02 the table \$30.00 774.751, which Pantal and 390-0 400 EJ OTCHUMNET (sole April Xecles district QUENIES. polici Zening ğ ٤

the cities of take manufaction the Character was then placed on of

alterial entreprise enginerica-STEEL PARTY Charlet with the Seles that books The Beninance use then rest aromene be unoughed by the

SUBSCITUTE ORDINAMOR

By Council Member Kelles: AN DEBTNANCE to among District Map No. 23 of disdinance No. 390-6, of partiagnes in cordinances or partiagnity no. 23 of disdinance to established in matter a first distinct to establish distribution and the first distinct to establish distribution and the first distribution a in ergulate the case of land and thank the person CHARLESTES (Deroit) to regulate and

Council Mancher Relies moved, To

a dassification newnded all projecties located on the west elsesification is presently of Riverview between Resice and Mid-1947 Destroct Map to show an 20 TINOUS disu ic C Secret

force and effect

Corporation Connect

fate and restrict the ned uses; to regulate and tion of hubblings designed the terms thereof," as amended. proxide for a Bours of Appeals, and invenent of the cost of such linhe area of yards, courts and other enforcement of this Ordinance; to procements according to the beneperiors and duties; and to establishment of a 2 ć Sports: assessment district for the for the administration and industries and to regulate the denand to provide businesses a therefrom; to the oppearprogram to previde for determine for speci-113 77.0-

THERE TELADING OF ORDINANCE ISBN duries and to provide a penalty The this to the Cuthmance was test of the mounton of the terms there was that for the mountoned, be and the same is regulate the use of land and struc-PEOPLE OF THE CITY OF DETROIT: regulate and determine the area of yards, courts and other open spaces; CV. : part: program to develop and physics or passesses or three therein to segulate and limit the height the area, the bulk and meanton of buildings; to regulate and restrict the location of trades and other establishmente and to provide a to provide for the establishment of a Board of Appeals and be cerived therefrom: ments occording to regulate the density of population luge designed for specified uses: industries and the location of ment of the cost local essessment district for Section 1. hereby smouded as follows: this Ordinance; to provide for Ordination No. That District Map No. Ordinatice to establish to the benefits to be and the same is and upgrade the to provide for שלב שלב מ 380-0 He posicis the pr build.

Ü (4.0.4) \mathcal{E} Garre CEMERET A COLUMN 3 ·



primary election and at least 120 days before the special general election. Nominating petitions for the special primary election shall be filed on or before the fourth Tuesday after the date of the council resolution calling the special general election. (Amend. No. 9, adopted 8-5-80, effective 8-27-80; Amend. No. 12, adopted 11-6-90, effective 12-10-90.)

Sec. 4-105. Rules and journal.

The city council shall determine its own rules and order of business and shall provide for keeping a journal of its proceedings in the English language. The journal shall be a public record.

State law reference—Mandatory that Charter provide for a journal as provided in this section, MCL 117.3(m), MSA 5.2073(m).

Sec. 4-106. Quorum.

A majority of city council members serving constitutes a quorum, but a smaller number may adjourn from time to time and may compel attendance of absent members in the manner and subject to the penalties provided by rule of the city council.

Sec. 4-107. Voting.

Except as otherwise provided by this Charter, no action of the city council shall be effective unless adopted by at least a majority of city council members present.

Subject to section 2-106 of this Charter, every city council member present shall vote on all questions.

On all ordinances, and in all other matters on the demand of 1 or more members of the city council, the yeas and nays shall be taken and entered in its journal.

Sec. 4-108. Investigation.

The city council may make investigations into the affairs of the city and the conduct of any city agency.

Sec. 4-109. Investigative powers.

The city council may subpoena witnesses, administer oaths, take testimony and require

the production of evidence in any matter pending before it or any of its committees. To enforce a subpoena or order for production of evidence or to impose any penalty prescribed for failure to obey a subpoena or order, the city council shall apply to the appropriate court.

City Code reference—Testimony before committees of council, § 2-2-16 et seq.

Sec. 4-110. Council clerk.

The city clerk shall serve as the city council's clerk and shall keep a record of all its ordinances, resolutions, and other proceedings and perform such other duties as it may provide.

Sec. 4-111. Control of property.

Except as otherwise provided by this Charter, the city may not sell or in any way dispose of any property without approval by resolution of the city council.

Sec. 4-112. Prohibition on interference in administration.

Except for purposes of inquiries and investigations, the city council or its members shall deal with city officers and employees who are subject to the direction and supervision of the mayor solely through the mayor, and neither the city council nor its members shall give orders to any such officer or employee, either publicly or privately.

Sec. 4-113. City action requiring an ordinance.

In addition to other acts required by law or by specific provision of this Charter to be done by ordinance, those acts of the city shall be by ordinance which:

- 1. Provide a penalty or establish a rule or regulation for violation of which a penalty is imposed;
- 2. Provide for the laying and collecting of renta, tolls, excises and taxes, except as otherwise provided in section 8-209 of

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Mahaifey: residents of the facilities in the id the State of live in settings provide for their and rules and regula-

P.A. 287 of 1972, authorizing the of Social Services omes have been i with the Joint nmittee on Sepow, Therefore, Be

the City Council 1st the Joint Adession to promptly so that all adult may begin to be the facilities can the neighborhoods that the State is onsibility for the our citizens, and

it copies of this unded to the Joint s Committee, to tion in the State gislative Agent at

Members Browne. i, Henderson, Hood, nd President Levin

MON (No. 3), per purnment.

RESOLUTION TH OF RCH OF ST. PAUL

er Mahaffey: aul's Episcopal Par-November 22, 1824, eting was held in l'House at Jefferson

rernor Lewis Cass rial Charter to St. h 8, 1825, and three ornerstone was laid three churches the supy over the next half, and

half, and
Parish will be celeAnniversary on Nowith the Presiding
iscopal Church, The
d Dillin, as guest
Henorable G. Mentice of the Michigan erving as toastmasat the Detroit City the commemoration

rous occasion, AND

RESOLVED. That the Detroit City Council recognizes the significant contributions made to the entire community by members of St. Paul's Parish over its proud and distinguished history.

Adopted as follows:

Yeas — Council Members Browne, Cleveland, Eberhard, Henderson, Hood, Kelley, Mahaffey, and President Levin

Navs None RECONSIDERATION (No. 4), per motions before adjournment.

Resolution

Resolution

By Council Member Henderson:
WHEREAS, the United Order for
Freedom, Inc. (U.O.F.) was organized
as a charitable organization to give
ald and assistance to ex-offenders
such as employment training services,
medical, social and financial services,
training in problem-solving and communications before and after release,
and generally to aid ex-offenders to
assimilate themselves in free society
and thereby aid in reducing the rate
of recidivism, and of recidivism, and

WHEREAS, The City of Detroit Corrections Department, through its Director, William W. Rucks, had begun implementing the U.O.F. program at Dehoco by appointment of liasons in both the men and women's divisions, and by taking steps to assure U.O.F. access to DEHOCo and its facilities. and

WHEREAS, It is alleged that the

WHEREAS, It is alleged that the Michigan Department of Corrections has interferred with and frustrated the efforts of organizations similar to U.O.F.; such as WE CARE, Incorporated and the MOTT FOUNDATION, among others, and WHEREAS. It is alleged William W. Rucks. Director of the Detroit Corrections Department, has not been able to continue implementation of the U.O.F. program because of alleged interferance by the Michigan Department of Corrections, NOW THEREFORE BE IT THEREFORE BE IT

RESOLVED. That the Honorable William G. Milliken. Governor of the State of Michigan, be and with this resolution is requested to investigate and review the above allegations of activities and policies of the Michigan Department of Corrections and activities and policies of the Michi-gan Department of Correctifies spe-cifically with regard to its activities in dealing with organizations such as U.O.P. Inc. its policies regarding pro-grams for the aid of ex-offenders, its policies regarding programs designed to aid prisoners in their pre-release preparation, and its policies and acti-vities in reviewing requests for funds to implement such programs.

eration" and numbered 1 to 4 incl., was adopted.

Council Member Hood moved to suspend Rule 23 for the purpose of indefinitely postponing the motion to reconsider, which motion prevailed as follows:

Yeas — Council Members Browne, Cleveland, Eberhard, Henderson, Hood, Kelley, Mahaffey, and President Levin **- 8**.

Navs None Council Member Eberhard then moved that the motion to reconsider be indefinitely postponed, which mo-

The regular order was resumed. And the Council then adjourned to reconvene on Monday, October 21, 1974, at the Call of the Chair.

CARL LEVIN, President.

JAMES H. BRADLEY, City Clerk.

(ADJOURNED SESSION)

All action of the City Council appearing herein is subject to approval of the Mayor.

Detroit, Monday, October 21, 1974

Pursuant to adjournment, the Council met at 11:18 A.M. and was called to order by the President, Hon. Carl Levin.

Present—Council Members Browne, Cleveland, Henderson, Hood, Kelley, Mahaffey, Rogell, and President Levin

There being a quorum present, the Council was declared to be in session.

Council Member Eberhard was absent due to illness.

ORDINANCE

By Council Member Henderson: AN ORDINANCE to amend Chapter 12 IN ORDINANCE to amend Chapter 12 of the Code of the City of Detroit by adding a new Article, to be known as Article VII, prohibiting the sale or conveyance of one (1) or two (2) family dwellings by governmental agencies and private real estate investors without a Certificate of Approval being issued by the Buildings and Safety Engineering Department or an Affidativit of Non-Occupancy being sworn

to aid prisoners in their pre-release preparation, and its policies and activities in reviewing requests for funds to implement such programs.

Council Member Browne moved that the matter be referred-back to the Committee of the Whole which motion prevailed.

RECONSIDERATION
Council Member Cleveland moved to reconsider the vote by which each resolution designated for *"Reconsider in the city of Detroit, often by fraudulent means, by private real estate investors and speculators; many of these dwellings have been

first purchased from or insured by the Federal Government and do not io meet even minimum standards habitability and liveability, and

WHEREAS. The danger to the health and safety of the people of the City of Detroit will assume crisis proportions because of the actions of the U.S. Department of Housing and Urban Development which has issued a Notice, HM74-57, which instructs the Detroit HUD Area Office to use as its "primary technique" sale on an "as-is" basis "without warranty" for disposal of its present inventory of at least 8,000 existing dwellings, which number to being augmented by at least one additional dwelling unit least one additional dwelling unit every two hours of the day, and WHEREAS, This will increase the number of sales of these dwellings

which have been previously aban-doned by their owners and will also have the effect of increasing the sale of other dwellings in the City caused by the blighting influence of such HUD homes and the failure of HUD HUD homes and the failure of HUD to repair such HUD acquired proper-

WHEREAS The citizens of Detroit urgently need protection from sales and resales of such property without full disclosure of such deficiencies in habitability and without assurance that the dwelling will be repaired so as to meet minimum standards of

health, safety and habitability,
NOW, THEREFORE, The City Council declares an emergency requiring
the immediate enactment of an ordinance to prevent the sale of such
properties without reasonable and

sufficient safeguards.

Section 1. That Chapter 12 of the Section 1. That Chapter 12 of the Code of the City of Detroit be amended by adding a new Article to be known as Article VII, Emergency Restrictions on Sales or Conveyances of One (1) and Two (2) Family Dwellings by Governmental Agencies and Private Real Estate Investors. Sec. 12-7-1. For the purposes of this

Article:

(a) Investment property means any one or two family dwelling which has been occupied by the seller transferor for a consecutive six (6) month period within the two (2) years immediately prior to the sale or transfer regulated herein.

(b) Sell or transfer means to con-

vey any interest in a one or two family dwelling except by a lease, mortgage, gift, devise or bequest; the sale or transfer shall be deemed to occur upon the transfer of title or execution of a land contract, which-

ever occurs earlier.
(c) Private real

estate investor (c) Private real estate investor means a person, trust, partnership, joint venture or corporation which holds legal or equitable title, in its own name or in the name of any of its agents, in investment property.

(d) Department means the Department of Publishers and Safety English

ment of Buildings and Safety Engineering.

Governmental Agency means

any instrumentality of city, county, state or federal government.

Sec. 12-7-2. (a) It shall be unlaw-ful for a governmental agency or private real estate investor to sell or transfer an investment property un-less the seller or transferor tenders, prior to the sale or transfer, to the purchaser or transferee, a Certificate of Approval issued by the Department within 45 days prior to the sale or transfer, certifying that the invest-ment property compiles with the minimum standards of liveability and habitability established under rules and regulations promulgated by the Department.

(b) The provisions of sub-section 12-7-2(a) shall not apply to a sale or transfer by a governmental agency or private real estate investor to a purchaser or transferee for the purpose of rehabilitation only, provided that the purchaser or transferee certifies by sworn affidavit that (1) the sale or transfer is for the purpose of rehabilitation; (2) the dwelling will never be occupied by him; and (3) he will not rent, nor allow any other person to occupy, the property without first obtaining a Certificate

of Approval.
(c) The provisions of sub-section (c) The provisions of sub-section 12-7-2(a) shall not apply to a sale or transfer by a governmental agency to a purchaser or transferee for the purpose of occupancy by said pur-chaser or transferee provided that: (1) the seller obtains, within 45 days prior to the sale or transfer and delivers to the purchaser or transferee at least 5 days prior to the sale of transfer, a copy of a Special Inspec-tion Report; and (2) the seller ob-tains from the purchaser or trans-feree and files with the Department a sworn affidavit that the purchaser or transferee will not occupy or allow the dwelling to be rented or otherwise occupied without first obtaining a Certificate of Approval and that he has been furnished a copy of the Special Inspection Report by the seller.

Sec. 12-7-3. A Certificate of Approval shall be issued by the Department for a one or two family residential dwelling when, after inspection of the dwelling, the Department has found such dwelling conforms with minimum standards of liveability and habitability established under rules and regulations promul-gated by the Department. The De-partment shall establish a reasonable fee schedule for services performed pursuant to this Article. The rules and regulations and application for inspection shall be obtainable at the Buildings and Safety Engineering Department and at other specified loca-

Sec. 12-7-4. A Special Inspection Report prepared by the Department pursuant to this Article shall note the deficiencies from the minimum October 21

standards required for issuance of a

Certificate of Approval.
Sec. 12-7-5. Affidavits required by Sec. 12-7-5. Affidavits required by this Article shall be sworn to by the purchaser or transferee and witnessed by the seller or transferor; the affidavit shall be made on a form provided by the Department and shall be filed with the Department or its designee by the seller or transferor designee by the seller or transferor in the presence of the purchaser or

transferee. Sec. 12-7-6. Any sale or transfer in violation of section 12-7-2 shall be lilegal. Any sale or transfer in violation of Section 12-7-2 (a) and any failure to adhere to statements made in the affidavits provided for in section 12-7-2(b) and 12-7-2(c) shall be

a misdemeanor.
Sec. 12-7-7. A penalty created by this ordinance shall not limit or derogate any other statutory or common law right of action.

Section 2. This ordinance is hereby given immediate effect.

Approved as to form:
ELLIOTT S. HALL
Corporation Counsel

Read twice by title.
Council Member Henderson then moved that inasmuch as this or-dinance is an emergency measure, it be placed on the order of third reading.

Third Reading Of Ordinance
The title to the ordinance was read a third time.

The ordinance was then read.

The question being "Shall this or-dinance now pass?" The Ordinance was passed, a majority of the Council Members present voting therefor as follows:

Yeas — Council Members Browne, Cleveland, Henderson, Hood, Kelley, Mahassey, Rogell, and President Levin

Nays - None.

Title to the Ordinance was confirmed.

Reconsideration

Council Member Cleveland moved to reconsider the vote by which the

ordinance was passed.

Council Member Rogell moved to suspend Rule 23 for the purpose of indefinitely postponing the motion to reconsider, which motion prevailed as

Yeas - Council Members Browne. Cleveland, Henderson, Hood, Kelley, Mahaffey, Rogell, and President Levin

Nays -- None. Council Member Kelley then moved at the motion to reconsider be indefinitely postponed, which motion prevailed.

The regular order was resumed, And the Council then adjourned.

> CARL LEVIN President

JAMES H. BRADLEY City Clerk

CITY COUNCIL

(REGULAR SESSION)

All action of the City Council appearing herein is subject to reconsideration and/or approval of the Mayor.

Detroit, Wednesday, October 23, 1974

The Council met and was called to order by the President, Hon. Levin.

Present-Council Member; Browne, Cleveland, Henderson, Hood, Kelley, Mahaffey, Rogell and President Levin-8.

There being a quorum present, the Council was declared to be in session. The journal of the session of Octo-

ber 9, 1974 was approved.
Council Member Eberhard was ab-

sent due to illness

Invocation Almighty and ever loving Father, we praise you in your wisdom for the institution of governments for the purpose of running the affairs of men. We thank you for the great city of Detroit its neonle its natural of Detroit, its people, its natural resources, and its industrial eminence, and its dedication to rebuild. Especially do we thank you for this august body of councilwomen and mon with their various talents, temperaments, and insights. As they debate the great issues, problems and opportunities which confront our beloved city, may they do so in honesty, courage and with great zeal. Let them know that though they may differ in approaches to the solutions of the city's crises, ever give them the termination to fight for their inditermination to fight for their individual convictions in righteousness and humility; give them the understanding to realize their mistakes and the strongness of heart to make these admissions with the grace and beauty of a true servant of God. Be merciful unto them as they work through their individual doubts, fears and frustrations. In the anxiety of decision making called for as they seck to cast their votes grant them the patience of deliberate thought, clear vision, and wisdom. As they work in their offices preparatory to Meeting with one another, give them the fidelity and cooperation of their staffs, a hound dog's sense as they do research, and the author's clarity as they prepare written reports. And when they are called upon to meet citizens' groups — grant them the patience of your servant Job; in the same manner, as they counsel with the Executive of our city — the Mayor, give them that degree of co-operation and perfect interfacing which is needed for each encounter in order that the compromises which are effected shall be for the best govern-

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PROBIBIT THE SALE OR
CONVEYANCE OF ONE (1) AND
TWO (2) FAMILY DWELLINGS
BY GOVERNMENTAL AGENCIES
AND PROVENTE HEAL ESTATE
AND PROVATE OF APPROVAL
BEING ISSUED BY THE
BUILDINGS AND SAFETY
ENGINEERING DEPARTMENT, ETC.

AN ORDINANCE to amend Chapter 1? of the (ede of the (tt) of betrott by adding a new article, to be known as Article VII, prohibiting the sale or conveyance of one (t) and (wo (2) family dwellings by and (wo (2) family dwellings by governmental agencies and private real estate investors without a (extilicate of Approval being swent to by the purchaser or transferce. If IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETIVITY. Section 1. That Chapter 12 of the Code of the City of Derbyt be amended by adding a new Article to be known as Article VII, Restrictions on Sales or Conveyances of One (1) and Two (2) Family Dwellings by Governmental Agencies and Private Real Estate Investors.

Sec. 12-7-1. For the purposes of this article:

(a) Investment Property means any one or two family dwelling which has not been occupied by the seller or transferor for a consecutive six (6) month period within the two (2) years immediately prior to the sale

or transfer regulated herein.
(b) Sell or transfer means to convey any interest in investment property except by a lease, mortgage, gift, devise or bequest, the sale or transfer shall be deemed to occur upon the transfer of title or execution of a land contract, whichever occurs ear-

(c) Private real estate investor means a person, trust, partnership, joint venture or corporation which holds legal or equilable title, in its own name or in the name of any of its agents, to investment property.

(d) Department means the Department of Buildings and Safety Engi-

neering.
(c) Governmental Agency means any instrumentality of City. County,

the sale or transfer, to the purchaser or transferse, a Certificate of Approval itsued by the Department within 90 State or Federal Government, Sec. 12-7-2. (a) It shall be unlawful for a Governmental Agency or Private Real Estate Investor to sell or transfer an investment property unless the seller or transferor tenders, prior to

divs prior to the sale or transfer cer-tifying that the investment property compiles with minimum standards of liveability and habitability established

ORDINANCE NO. 191-11

the direct rules and regulations promulgated by the Department, Sales
(b) The provisions of subsection
12-7-2(a) shall not apply to a sale
for transfer by a Governmental Agency
or Private Real Estate Investor to a
purchaser or transferee for the purpose of rehabilitation only. Provided
that the purchaser or transferee certifies by sworn affidavit that: (1)
the sale or transfer is for the purpose of rehabilitation; (2) the dwellthe sale or transfer is for the purpose of rehabilitation; (2) the dwellthe pose of rehabilitation; (3) the dwellting will never be occupied by him;
and (3) he will not reat, nor allow
any other person to occupy the property without first obtaining a certilicute of approval

icute of approval.

(c) The provisions of subsection 12-7-2(a) shall not apply to a sale or 12-7-2(a) shall not apply to a sale or transfer by a Governmental Agency or from an estate where the sale or transfer by the agency or from the estate to a purchaser or transfere. Provided that: (1) the seller or transferor obtains, within 90 days prior to the purchaser or transfere, and delivers to the purchaser or transfere, and delivers to the purchaser or transfere, a copy of a special inspection report; and (2) the seller or transferor obtains from the purchaser or transfere and files with the Department a sworn affidavit that the purchaser or transfere the dwelling to be rented or otherwise occupied without first obtaining a Certificate of Approval and that he has been furnished a copy of the special inspection report by the seller or transferor.

(d) The provisions of subsection 12/7-(a) shall not apply to a sale or trunsfer by a Governmental Agency or Private Real Estate Investor to a purchaser or transferee who has occupied the Investment property for at least 12 months immediately prior to the sale or transfer is not pursuant to the sale or transfer is not pursuant to the cxercise of an option held by the seller or transferor.

(e) The provisions of subsection 12,72(a) shall not apply to a sale or transfer by one Government Agency

to another.

Sec. 12-T-3. A Certificate of Approval shall be lasued by the Department for a one or two family residential dwelling when, after inspection of the dwelling, the Department has found such dwelling conforms with minimum standards of liveability and habitability established under the Department. The Department shall establish a reasonable fee schedule for services performed pursuant rules and regulations promulgated by the Department. The Department

to this article. The rules and regula-tions and application for inspection shall be obtainable at the Depart-ment's Offices and at other specified locations

locations.

Bec. 12-7-4. A special inspection report prepared by the Department pursuant to this article shall note the deficiencies for the minimum standards required for fasuance of a Certificate of Approval.

Bec. 12-5-7. Affidavits required by the article shall be sworn to by the purchaser or transferce and witnessed by the seller or transferor; the affidavit shall be made on a form provided by the Department and shall be filed with the Department or its designee by the seller or transferor in the presence of the purchaser or transferor.

12-7-6. Any sale or transfer

misdemeanor.

Sec. 12-7-7. A penalty created by this article shall not limit or derogate any other statutory or common law in violation of Section 12-7-2 shall be illegal. Any sale or transfer in violation of Section 12-7-2 and any failure to achiere to statements made in the affdavits provided for in Sub-sections 12-7-2(b) and 13-7-2(c) shall be a

expire on June 30, 1976. Section 2. This ordinance shall take effect on March 31, 1976, and shall right of action, Passed March 24, 1976.
Approved March 28, 1976.
Published April 2, 1976.
Effective March 31, 1976. (JCC P. 505-06, March 12, 1976) 1976, and shall

JAMES H. BRADLEY
City Clerk



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520 Pa. 38, *; 550 A.2d 184, **; 1988 Pa. LEXIS 295, ***

Richard A. SPRAGUE, in his capacities as attorney at law in the Commonwealth of Pennsylvania, taxpayer in the Commonwealth of Pennsylvania, and citizen of and duly registered voter in the Commonwealth of Pennsylvania, Petitioner, v. Robert P. CASEY, in his official capacity as Governor of the Commonwealth of Pennsylvania, James J. Haggerty, in his official capacity as Secretary of the Commonwealth of Pennsylvania, William Boehm, in his official capacity as Commissioner of the Bureau of Legislation, Commissions and Elections, Allen Ertel, in his capacity as Democratic Party nominee for the office of Justice of Supreme Court of Pennsylvania, Anita B. Brody, in her capacity as Republican Party nominee for the office of Justice of the Supreme Court of Pennsylvania, Walter M. Cohen, in his capacity as Republican Party nominee for the office of Judge of the Superior Court of Pennsylvania, and Catherine Ford-Elliot, in her capacity as Democratic Party nominee for the office of Judge of the Superior Court of Pennsylvania, Respondents

No. 116 E.D. Misc. Dkt. 1988

Supreme Court of Pennsylvania

520 Pa. 38; 550 A.2d 184; 1988 Pa. LEXIS 295

September 27, 1988, Argued October 25, 1988, Decided

DISPOSITION: [***1]

The petitions for reargument filed in this matter are denied.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner taxpayer sought summary relief from the Supreme Court of Pennsylvania, and requested that the court exercise its plenary jurisdiction upon petitioner's action for declaratory and injunctive relief challenging the placement on the general election ballot one seat on the Supreme Court and one seat on the Superior Court.

OVERVIEW: Petitioner challenged the placing of one seat on the Supreme Court and one seat on the Superior Court on the general election ballot. The Supreme Court granted petitioner's motion for the exercise of plenary jurisdiction. The court granted petitioner's application for summary relief and directed the removal of the offices of Justice of the Supreme Court and Judge of the Superior Court from the general election ballot. The court held that an election to fill Supreme Court and Superior Court offices may not be placed on the ballot during a general election because Pa. Const. art. V. § 13(a) mandated that all judicial officers were to be elected at the municipal election next preceding the commencement of their respective terms. The court ruled that the governor was required to make an appointment to fill vacancies that occurred during the term of office because the constitutional provision was explicit and comprehensive in its direction as to how the transition in office was to occur in the event of a vacancy. The court noted that the governor's appointments were erroneous because the term of the appointment should have run until the next municipal election.

OUTCOME: The court granted petitioner taxpayer's application for summary relief and directed the removal of the offices of Justice of the Supreme Court and Judge of the Superior Court from the general election ballot because the relevant constitutional provision required the election of those offices at the next municipal election.

CORE TERMS: election, vacancy, municipal election, elected, appointment, appointed, general election, laches, seat, term of office, expire, fill, odd-numbered, even-numbered, appointee, unexpired term, filled, new term, scheduled, commence, nominee, ballot, indispensable parties, jurist, peace, prevail, appointing authority, resignation, municipal, diligence

LexisNexis(TM) HEADNOTES - Core Concepts - * Hide Concepts

Civil Procedure > Justiciability > Standing

Constitutional Law > The Judiciary > Case or Controversy > Standing

HNI In order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. To surpass that common interest, the interest must be substantial, direct and immediate. However, certain cases warrant the grant of standing to taxpayers where their interest arguably is not substantial, direct and immediate. Although many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts.

Civil Procedure > Justiciability > Standing

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN2 The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. Such litigation allows the courts, within the framework of traditional notions of standing, to add

judicial scrutiny of the statutory and constitutional validity of their acts. Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses HN3 Laches bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another. Thus, in order to prevail on an assertion of laches, respondents must establish: a) a delay arising from petitioner's failure to exercise due diligence; and, b) prejudice to the respondents resulting from the delay. Moreover, the question of laches is factual and is determined by examining the circumstances of each case. Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses HN4 The sort of prejudice required to raise the defense of laches is some changed condition of the parties which occurs during the period of, and in reliance on, the delay. The prejudice cannot be based on a change of position taking place before the complainant could have and reasonably should have brought suit. Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses Constitutional Law > State Constitutional Operation & Amendment HN5 Laches and prejudice can never be permitted to amend the Constitution. Civil Procedure > Joinder of Claims & Parties > Joinder of Necessary Parties HN6 Unless all indispensable parties are made parties to an action, a court is powerless to grant relief. A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. A corollary of this principle is that a party against whom no redress is sought need not be joined. In this connection, if the merits of a case can be determined without prejudice to the rights of an absent party, the court may proceed. Constitutional Law > State Constitutional Operation & Amendment HN7 Because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible. Governments > Courts > Court Personnel & Judges HNS Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve. Pa. Const. art. V, § 13(a). Governments > Courts > Court Personnel & Judges $^{HN9}\square$ All judges elected by the electors of the state at large may be elected at either a general or municipal election, as circumstances may

to the controls over public officials inherent in the elective process the

require. All elections for judges of the courts for the several judicial districts, and for county, city, ward, borough, and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, That such elections shall be held in an odd-numbered year: Provided further, That all judges for the courts of the several judicial districts holding office at the present time, whose terms of office may end in an odd-numbered year, shall continue to hold their offices until the first Monday of January in the next succeeding even-numbered year. Pa. Const. art. VII, § 3.

Governments > State & Territorial Governments > Elections Governments > Courts > Court Personnel & Judges

The term "municipal election" is defined as the election held on the first Tuesday following the first Monday in November in each odd-numbered year. 1 Pa. Cons. Stat. § 1991. The general election is the election held on the Tuesday next following the first Monday of November in each even-numbered year. 1 Pa. Cons. Stat. § 1991.

Governments > Courts > Court Personnel & Judges

A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. The appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justices of the peace which shall be by a majority. The person so appointed shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less. Pa. Const. art. V, § 13(b).

Governments > Legislation > Enactment

Constitutional Law > State Constitutional Operation & Amendment

HN12 All acts of the legislature and of any governmental agency are
subordinate to the Constitution, which is the Supreme Law of the
land; and therefore no matter how desirable the act may appear or
how worthy the objective, it cannot be sustained if it is interdicted by
the Constitution.

Constitutional Law > State Constitutional Operation & Amendment Governments > Courts > Court Personnel & Judges

If some impediment arises during the appointed term that would prevent the appointee from completing that term, it is to be noted that the balance of the interim term must remain vacant until the new term commences. Pa. Const. art. V, § 13(c) provides that in the case of a vacancy occurring at the expiration of an appointive term under section thirteen (b), the vacancy shall be filled by election as provided in section thirteen (a).

COUNSEL: Richard A. Sprague, Geoffrey R. Johnson, Philip I. Weinberg,

Philadelphia, for petitioner.

Edward W. Mullinix, James D. Crawford, Schnader, Harrison, Segal & Lewis, Philadelphia, for Anita B. Brody.

Thomas A. Leonard, Dilworth, Paxson, Kalish & Kauffman, Philadelphia, for Allen Ertel.

Neil T. O'Donnell, Philadelphia, for Catherine Ford-Elliot.

Morey M. Myers, Gen. Counsel, Richard D. Spiegelman, Chief Deputy Gen. Counsel, Harrisburg, for Agency Liaison.

Andrew H. Cline, Deputy Gen. Counsel, Harrisburg, for Robert P. Casey, James J. Haggerty and William Boehm.

David Richman, Pepper, Hamilton & Scheetz, Philadelphia, for Walter M. Cohen.

E. Barclay Cale, Jr., Thomas B. Kenworthy, Andrew D. Leipold, Morgan, Lewis & Bockius, Philadelphia, amici curiae for Republican State Committee of Pennsylvania.

Karen M. Balaban, Harrisburg, for Pennsylvania Democratic State Committee.

JUDGES: Nix, C.J., and Larsen, Flaherty, McDermott, Zappala and Papadakos, JJ. Stout, J., did not participate in the consideration or decision of this case.

OPINIONBY: NIX

OPINION: [*42] [186]** OPINION

This lawsuit was instituted by Petitioner, Richard A. Sprague, who filed a Complaint [***2] for Declaratory and Injunctive Relief in the Commonwealth Court challenging the placing on the ballot in the November 1988 general election one seat on the Supreme Court and one seat on the Superior Court. Named as respondents in the action were Robert P. Casey, in his official capacity as Governor of the Commonwealth of Pennsylvania; James J. Haggerty, in his official capacity as Secretary of the Commonwealth of Pennsylvania; William Boehm, in his official capacity as Commissioner of the Bureau of Legislation, Commissions and Elections; Allen Ertel, in his capacity as Democratic Party nominee for the office of Justice of the Supreme Court of Pennsylvania; Anita B. Brody, in her capacity as Republican Party nominee for the office of Justice of the Supreme Court of Pennsylvania; Walter M. Cohen, in his capacity as Republican Party nominee for the office of Judge of the Superior Court of Pennsylvania; and, Catherine Ford-Elliot, in her capacity as Democratic Party nominee for the office of Judge of the Superior Court of Pennsylvania. The various respondents filed preliminary objections to the complaint filed by petitioner. Prior to argument in the Commonwealth Court which was scheduled [***3] for September 14, 1988, this Court, in response to petitioner's request for the Exercise of Plenary Jurisdiction, entered an order on September 12, 1988, granting the petition for the Exercise of Plenary Jurisdiction, and listed the case for argument during the

September argument session in Pittsburgh. n1 After the receipt of briefs and oral argument, this Court entered a *per curiam* order on <u>September 27, 1988, 519 Pa. 313, 548 [*43] A.2d 249, denying respondents' preliminary objections, granting petitioner's application for summary relief and directing the Secretary of the Commonwealth to remove from the ballot in the general election of 1988 the offices of Justice of the Supreme Court and Judge of the Superior Court. We now file this opinion to set forth the reasons for the aforesaid order.</u>

n1 The applications of the Pennsylvania Democratic State Committee and the Republican State Committee of Pennsylvania for status as Amicus Curiae in this action were granted.
I.

Before reaching [***4] the merits of the instant case we must first address the issues raised by respondents in their preliminary [**187] objections. Respondents argue that the petitioner lacks standing to pursue the instant suit because the governmental action challenged does not substantially impact on him in a direct and immediate manner. However, we find that the petitioner has standing to maintain this action because this case falls within the narrow exception recognized by this Court in <u>Application of Biester</u>, 487 Pa. 438, 409 A.2d 848 (1979).

Generally, HNI in order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). To surpass that common interest, the interest must be substantial, direct and immediate. Id. In Biester, however, we determined that certain cases warrant the grant of standing to taxpayers where their interest arguably is not substantial, direct and immediate. Biester, 487 Pa. at 444, 409 A.2d at 852. In reaching that [***5] conclusion, we considered Faden v. Philadelphia Housing Authority, 424 Pa. 273, 227 A.2d 619 (1967), where this Court announced that "although many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts." Biester, 487 Pa. at 445, 409 A.2d at 852. Furthermore, we noted that:

HN2

[*44] The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. . . . Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of

their acts.

Biester, supra, 487 Pa. at 443 n. 5, 409 A.2d at 851 n. 5. See also Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 507 A.2d 323 (1986). [***6]

Moreover, in *Biester*, we considered that the issue was likely to escape judicial review when those directly and immediately affected by the complained of conduct were beneficially affected as opposed to adversely affected. We also recognized that "consideration must be given to other factors such as, for example, the appropriateness of judicial relief, the availability of redress through other channels, or the existence of other persons better situated to assert the claim." *Biester*, 487 Pa. at 446, 409 A.2d at 852. (*Quoting*, *Government of Guam*, *ex rel. Camacho v. Bird*, 398 F.2d 314 (9th Cir.1968) (citations omitted)).

In this case, we believe that the special circumstances involved warrant the grant of standing to petitioner under the exception articulated in *Biester*. If standing were not granted to the petitioner, this election would otherwise go unchallenged because respondents are directly and beneficially affected. Judicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts, *cf. Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165 (1981); [***7] *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464 (1948), and redress through other channels is unavailable. Finally, the only persons better situated to maintain this action are the respondents who did not choose to institute legal action.

[*45] Having determined that petitioner has standing to maintain this action, we now turn to the question of whether the equitable doctrine of laches applies to the instant case. ***** Laches bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another. **Wilson v. King of Prussia* **Enterprises, Inc., 422 Pa. 128, 221 A.2d 123 (1966). Thus, in order to prevail on an assertion of laches, respondents must establish: a) a delay arising from petitioner's failure to exercise due diligence; and, b) prejudice to the respondents resulting from the delay. **Class of 200 Administrative Faculty** **Members v. Scanlon, 502 Pa. 275, 466 A.2d 103 (1983); [**188] **Leedom v. Thomas, 473 Pa. 193, 373 A.2d 1329 (1977). **Moreover, the question of laches [***8] is factual and is determined by examining the circumstances of each case. **Leedom, supra.**

Respondents contend that the petitioner unreasonably failed to commence this action for six and one-half months from the time he had actual or constructive notice of his claim. Specifically, respondents allege that petitioner had notice of the scheduled elections from as early as February 2, 1988, when such notice was published in a Philadelphia newspaper. Petitioner argues that although he may have had constructive notice of the elections at that time, he asserts that he was not aware of the constitutional issues surrounding the election until July 1, 1988. The correct inquiry in determining whether his conduct resulted in a want of due diligence is to focus not upon "what the plaintiff knows, 'but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him,'" *Taylor v. Coggins*, 244 Pa. 228, 231, 90 A. 633, 634 (1914) (quoting Scranton

Gas & Water Co. v. Lackawanna Iron & Coal Co., 167 Pa. 136, 31 A. 484 (1895)). What the law requires [***9] of petitioner is to discover those facts which were discoverable through the exercise of reasonable diligence. Turtzo v. Boyer, 370 Pa. 526, 88 A.2d 884 (1952). In the instant case, petitioner had not only to discover the facts surrounding his claim, but [*46] also to ascertain the legal consequences of those facts. It is asserted petitioner, as an attorney, is deemed to be familiar with the mandate of the Constitution of this Commonwealth, and thus should have been immediately aware of his claim. The candidates-respondents, however, are also lawyers and are candidates for offices on the two highest courts in this jurisdiction, and should be charged with the knowledge of the Constitution as well. Respondents are requesting that this Court use its equitable powers to deny petitioner relief; yet, they have made no effort to seek judicial approval of the scheduled election. He who seeks equity must do equity. Mazer v. Sargent Electric Co., 407 Pa. 169, 180 A.2d 63 (1962), Hartman v. Cohn, 350 Pa. 41, 38 A.2d 22 (1944). To find that petitioner was not duly diligent in pursuing his [***10] claim would require this Court to ignore the fact that respondents failed to ascertain the same facts and legal consequences and failed to diligently pursue any possible action. We cannot say that respondents who seek to invoke this equitable defense have acted equitably in this manner. In light of the foregoing, we cannot say that petitioner failed to pursue this matter diligently. Here petitioner used reasonable diligence to discover the facts supporting his claim as soon as he knew a claim existed.

With regard to the issue of prejudice caused to respondents as a result of the delay, respondents have failed to meet their burden of proof as well. Respondents claim that they were prejudiced by the delay in that they expended time, money and effort for the scheduled election. What respondents fail to realize, however, is that "** the sort of prejudice required to raise the defense of laches is some changed condition of the parties which occurs during the period of, and in reliance on, the delay. The prejudice "cannot be based on a change of position taking place before the complainant could have and reasonably should have brought suit." *Leedom v. Thomas, supra, 473 Pa. at 202, 373 A.2d at 1333 (1977). [***11] Undoubtedly respondents here began preparing and spending time and money on their [*47] campaigns as soon as they knew there would be an election. They did not act solely in reliance on petitioner's lack of action.

We find the respondents have failed to meet their burden of proof on the defense of laches because they have failed to show a lack of due diligence in the filing of this action and they have failed to demonstrate that the delay prejudiced them in any way. Most importantly, **HNS*** laches and prejudice can never be permitted to amend the Constitution. As noted by this Court in

Wilson et ux. v. Philadelphia School District, et al., 328 Pa. 225, 195 A. 90 (1937):

We have not been able to discover any case which holds that laches will bar an [**189] attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives. To so hold would establish a dangerous precedent, the evil effect of which might reach far

beyond present expectations. <u>Id.</u> at 242, 195 A. at 99. [***12]

See also <u>Commonwealth v. Gilligan</u>, 195 Pa. 504, 46 A. 124 (1900). As early as 1900 Justice Mitchell explicitly stated that laches would not, *ipso facto*, operate to prevent the court from declaring an act void in violation of the constitution, even if the traditional elements of laches had been established.

The act has stood on the statute book, without challenge for nearly a quarter of a century, and millions of dollars of school funds have been collected and disbursed under its provisions. . . [T]hese are not reasons for refusing to declare it void if in contravention of the constitution, <u>Id.</u> at 511, 46 A. at 125.

In *Gilligan* the court did not find a constitutional violation. Here, the constitutional violation, as will be discussed *infra*, is patent.

Another preliminary objection, raised by two of the respondents, is that the petitioner failed to join indispensable parties and that such failure precludes this Court from [*48] proceeding with the action. The persons alleged by the respondents to be indispensable parties are Justice Juanita Kidd Stout of the Supreme Court and Judge [***13] James R. Melinson of the Superior Court, each of whom was appointed by Governor Casey to fill a judicial vacancy. Justice Stout was appointed on February 8, 1988, to fill a vacancy created by the resignation of former Supreme Court Justice William D. Hutchinson. The term of Justice Stout's appointment was commissioned to expire on the first Monday of January, 1989. Judge Melinson was also appointed on February 8, 1988, to fill a vacancy caused by the resignation of former Superior Court Judge Richard B. Wickersham. Judge Melinson's appointment, like that of Justice Stout, was commissioned to expire on the first Monday of January, 1989.

In asserting that Justice Stout and Judge Melinson are indispensable parties, the respondents aver that each of those judicial officers has a direct interest in the outcome of this litigation. In support of that contention, the respondents argue that, should petitioner Sprague prevail, both Justice Stout and Judge Melinson will have their appointive terms extended beyond the expiration date designated by the Governor. Another assertion advanced by one of the respondents is that, if the petitioner prevails in the action, the appointments of Justice [***14] Stout and Judge Melinson might have to be nullified as being unconstitutional.

It is true, of course, that **M**Dunless all indispensable parties are made parties to an action, a court is powerless to grant relief. E.g., **Tigue v. Basalyga*, 451 Pa. 436, 304 A.2d 119 (1973). Thus, the absence of such a party goes absolutely to the court's jurisdiction. **Columbia Gas Transmission Corp. v. Diamond Fuel Co., 464 Pa. 377, 346 A.2d 788 (1975); **Pincus v. Mutual Assurance Co., 457 Pa. 94, 321 A.2d 906 (1974); **Tigue v. Basalyga*, supra. A party is indispensable when his or her rights are so connected with the claims

of the litigants that no decree can be made without impairing those rights. *Tigue v. Basalyga, supra; Powell v. Shepard*, 381 Pa. 405, 113 A.2d 261 (1955). A [*49] corollary of this principle is that a party against whom no redress is sought need not be joined. *Kern v. Duquesne Brewing Co.*, 396 Pa. 279, 152 A.2d 682 (1959); *In re Culbertson's Estate*, 301 Pa. 438, 152 A. 540 (1930). [***15] In this connection, if the merits of a case can be determined without prejudice to the rights of an absent party, the court may proceed. *Mechanicsburg Area School District v. Kline*, 494 Pa. 476, 431 A.2d 953 (1981).

Application of the above principles to the instant case makes it abundantly clear that Justice Stout and Judge Melinson are not indispensable parties. It must be kept in mind that the right ostensibly conferred [**190] upon each of the appointees, by her or his commission, was a term of office lasting until the first Monday of January, 1989. Each of the appointees accepted a commission with that apparent limitation, and took no steps to challenge the official decision to put those seats on the ballot for the November 1988 general election. The action brought by petitioner Sprague sought no redress against either Justice Stout or Judge Melinson, and in no way sought to diminish the rights they had been given and had accepted. Moreover, the relief sought by the petitioner would expand the terms of their appointments, and thus could not be adverse to their interests. Should the respondents prevail on the merits of this case, Justice Stout and [***16] Judge Melinson will have the same rights they had before this suit was commenced -- a right of office lasting until the first Monday of January 1989.

The argument that Sprague's position, if it prevails, will invalidate the two judicial appointments, is without merit. If petitioner Sprague is correct on the merits, it will affect only the duration of the appointments, not the validity of the Governor's act of making them. The result will be that the terms of the appointments will have to be amended to reflect the dictates of our state constitution. We therefore concluded that Justice Stout and Judge Melinson were not indispensable parties.

[*50] II.

At the heart of this controversy is petitioner's claim that an election to fill the offices of Justice of the Supreme Court and Judge of the Superior Court may not be placed on the ballot during a general election under the Constitution of this Commonwealth. The respondents rely upon this Court's opinion in Cavanaugh v. Davis, 497 Pa. 351, 440 A.2d 1380 (1982) ("Cavanaugh"), in support of the propriety of conducting the election for these offices during a general election. The vacancy for the [***17] seat of Justice of the Supreme Court was occasioned by the resignation of the former Justice Hutchinson which occurred on October 16, 1987. The vacancy on the Superior Court arose when former Judge Wickersham resigned on March 8, 1987.

In an effort to resolve the conflict between Article V, section 13(a), n2 which mandates that all judicial officers of this Commonwealth "shall be elected at the municipal election next preceding the commencement of their respective terms . . .," and Article VII, section 3, n3 which permits the election of statewide judges in general or municipal elections, n4 [*51] as the circumstances may require, the Court in Cavanaugh carved an exception to

the absolute mandate of Article V, section 13(a). The majority in *Cavanaugh* reasoned as follows:

[**191] Respondent's argument disregards established principles of constitutional construction. Because the language of the two constitutional provisions at issue relates to the same subject matter, the election of judges, the two provisions must be construed together. See <u>Berardocco v. Colden, 469 Pa. 452, 459, 366 A.2d 574, 577 (1976); Firing v. Kephart, 466 Pa. 560, 353 A.2d 833 (1976); [***18] Weiss v. Ziegler, 327 Pa. 100, 104, 193 A. 642, 644 (1937). See also Statutory Construction Act of 1972, 1 Pa.C.S. § 1932. Moreover, HNZ because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible. See <u>Cali v. Philadelphia, 406 Pa. 290, 177 A.2d 824 (1962).</u> See also Statutory Construction Act of 1972, 1 Pa.C.S. § 1921(a).</u>

When Article VII, § 3, and Article V, § 13, are read in light of these principles, it is clear that the Constitution treats differently two classes of judges, those judges who are chosen by electors of the State at large and those judges who are elected locally. Locally elected judges are to be chosen at municipal elections, which are defined in Article VII, § 3, as elections held in odd-numbered years. No exception to this rule is provided. By contrast, although judges elected state-wide ordinarily are to be chosen at municipal elections, an explicit constitutional exception is provided for election at a general election "as circumstances may require."

Id., 497 Pa. at 354, 440 A.2d at 1381-1382.

n2 Election of justices, judges and justices of the peace; vacancies
(a) HN8 Ustices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve. Pa. Const. art. V, § 13(a). [***19]

n3 Municipal election day; offices to be filled on election days

HN9 All judges elected by the electors of the State at large may be elected at either a general or municipal election, as circumstances may require. All elections for judges of the courts for the several judicial districts, and for county, city, ward,

borough, and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, That such elections shall be held in an odd-numbered year: Provided further, That all judges for the courts of the several judicial districts holding office at the present time, whose terms of office may end in an odd-numbered year, shall continue to hold their offices until the first Monday of January in the next succeeding even-numbered year. Pa. Const. art. VII, § 3.

n4 HN10 The term "municipal election" is defined as "[t]he election held on the first Tuesday following the first Monday in November in each odd-numbered year. 1 Pa.C.S. § 1991. The general election is the election held "on the Tuesday next following the first Monday of November in each even-numbered year." Id. (Emphasis added.)

------[*****20**]

If we posit the validity of the above reasoning, its applicability to the instant facts is difficult to ascertain. We are confronted with two vacancies that occurred because the **[*52]** jurists failed to serve their full term of office. In *Cavanaugh*, there was no vacancy occurring during the term of office. Chief Justice O'Brien completed a full twenty-one-year term. The question presented was whether the pertinent constitutional provisions required a hiatus to occur between the end of Justice O'Brien's term in January 1983 and the next scheduled municipal election. The interjection of the *Cavanaugh* issue in the factual matrix now before us can only be accomplished by a strained interpretation of constitutional intent and a disregard of an unambiguous constitutional direction.

A.

When a question relating to a vacancy occurring during the term of office arises, the constitution is explicit and comprehensive in its direction as to how the transition is to occur. The pertinent portion of Article V, section 13(b), as amended November 6, 1979, for our purposes provides:

Election of justices, judges and justices of the peace; vacancies

(b) HN11 A vacancy in the office [***21] of justice, judge or justice of the peace shall be filled by appointment by the Governor. The appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justices of the peace which shall be by a majority. The person so appointed shall serve for a term ending on the first Monday of January following the next municipal

election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less,

Pa. Const. art. V, § 13(b) (amended November 6, 1979).

This provision does not confer discretion in the Governor as to whether this power of appointment should be used to fill the vacancy or the term for which that appointment should extend. The language of Article V, section 13(b) providing that the vacancy "shall be filled by appointment by the Governor" leaves no discretion in that officer as to how he is to proceed once the vacancy during the term of [*53] office occurs. Similarly, the language directing that "[t]he person so appointed shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy [***22] occurs or for the remainder of the unexpired term, whichever is less," is explicit as to when the interim term must end and the succeeding elective term begins. The only discretion left to be exercised by the appointing [**192] authority is the designation of the appointee.

Both of the vacancies in this matter occurred by resignation during the term of office. In each instance the first municipal election more than ten months after the vacancy occurred will be the November 1989 municipal election. If the former jurists had served their full terms, the unexpired term in each instance would have extended to or beyond the first Monday in January 1990. n5 Thus Article V, section 13(b) mandates that the new terms of office must commence in January 1990. The election to designate a jurist to fill that term must be conducted in the municipal election to be held in 1989, and the new term must commence on the first Monday of January 1990. Our decision in *Cavanaugh* is clearly not applicable to the instant situation, nor could it have legitimately been perceived to apply in this situation. As noted by this Court in *Miller v. City of Beaver Falls*, 368 Pa. 189, 192, 82 A.2d 34, 36 (1951): [***231

HN12

[A]II acts of the legislature and of any governmental agency are subordinate to the Constitution, which is the Supreme Law of the land; and therefore no matter how desirable the act may appear or how worthy the objective, [*54] it cannot be sustained if it is interdicted by the Constitution.

n5 The regular term of Justice Hutchinson would have expired on the first Monday in January 1992. The unexpired term of Judge Wickersham would have ended on the first Monday in January 1990. If the former jurists had served their full terms, the elections to fill those positions would have been in the municipal elections of 1991 and 1989 respectively. The unexpired term of Judge Wickersham coincides with the alternative provision provided for in Article V, section 13(b). The unexpired term of Justice Hutchinson extends beyond the period prescribed within that section of the constitution. Thus, in

both cases it is mandated that the new term commence on the first Monday in January 1990 with the election filling that office occurring in the November 1989 municipal election. In the instant case the vacancies, having occurred during the term of office, were required to be filled by gubernatorial appointment exercised in accordance with section 13(b) of Article V. That provision properly applied in this case would have created two new judicial terms commencing the first Monday of January 1990. Therefore the terms of ten years commencing in an even year would thereafter expire in an even year. Thus the concern of Cavanaugh is not legitimately present. What injected this question into this scenario was the attempt to exercise the gubernatorial appointment in a manner contrary to the mandate of section 13(b). Both appointees were given commissions for their appointed terms indicating an expiration on the first Monday of January 1989, n6 n6 The Secretary of the Commonwealth initiated the election process to fill these vacancies in the general election of November 1988 by notifying each county Board of Elections of his certification that the offices of Justice of the Supreme Court and Judge of the Superior Court "as two of those offices to which a candidate will be elected at the general election on November 8, 1988." This notification was given to the county Board of Elections prior to January 15, 1988, pursuant to section 905 of the Election Code, Act of June 3, 1937, P.L. 1333, as amended, <u>25 P.S. § 2865</u> (1988 Supp.). Since the actions of the appointing authority were not in conformity with the constitutional provision conferring that power, they may not be permitted to

since the actions of the appointing authority were not in conformity with the constitutional provision conferring that power, they may not be permitted to stand. As previously noted, the only discretion in the exercising of the power of appointment to fill a vacancy that occurs during the term is the designation of the appointee. The lengths of that interim appointed term and the date of its expiration is prescribed explicitly by the constitutional provision and that mandate cannot be avoided. The terms, in this instance, for the interim appointees must by operation of law run to the first Monday of January 1990.

n7 HN13 If some impediment arises during the appointed term that would prevent the appointee from completing that term, it is to be noted that the balance of the interim term must remain vacant until the new term commences. Article V, section 13(c) provides:

In the case of a vacancy occurring at the expiration of an appointive term under section thirteen (b), the vacancy shall be filled by election as provided in section thirteen (a).

[*	**26]
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[*55] The resignations during the respective term in this matter did not create a *Cavanaugh* [**193] issue. That situation only arose because of the failure of the appointing authority to exercise the power of appointment in accordance with *clear* constitutional mandate. To permit the remedy provided in *Cavanaugh* to apply here would legitimize a clear violation of section 13(b) of Article V, which violation in fact created the problem in the first instance. Such a result would be obviously jurisprudentially unsound and cannot be countenanced. n8

n8 The Secretary of the Commonwealth is directed to amend the term of office in the commissions of the two appointed jurists consistent with this opinion.

We were fully aware of the unsettling impact of our September 27, 1988, order, but we were nevertheless constrained to insist that an unambiguous constitutional direction may not be ignored. The directions of Article V, section 13(b), are clear and precise. n9 Equally clear is that [*56] the procedure sought to [***27] be followed in the instant case did not conform to that constitutional mandate, and the consequences of ignoring or condoning that deviation would be unacceptable, n10 The instant dilemma is further compounded because it is evident in this record that the administration did not deliberately intend to violate section 13(b), but may have been misled by prior precedent in this area. The irony of the situation is best illustrated in that the respondents who support the errant governmental action in this case rely on those cases articulating the constitutional preference of an elected jurist over an appointed judge. The context in which that premise was developed occurred in situations where the appointing authority attempted to extend the power of appointment to the detriment of the right of the public to elect judges. See, e.g., Berardocco v. Colden, 469 Pa. 452, 366 A.2d 574 (1976). Here the administration attempted to curtail the appointing authority in favor of the elected judge, evidencing their good faith and [*57] also rendering [**194] inapplicable in this instance the authority of those cases which condemn the undue expansion of the appointive [***28] power provided under section 13(b) of Article V. It is equally evident that the breadth of our Cavanaugh decision has been misperceived and that its sui generis quality was not clearly conveyed. We are also constrained to acknowledge that the Cavanaugh holding failed to eliminate the evil it was designed to address and, if left standing, would perpetuate the problem. While we appreciate the disappointment of those candidates who successfully obtained nomination of their respective parties and their respective supporters, we cannot permit this concern to cloud our clear responsibility.

n9 In <u>Berardocco v. Colden</u>, 469 Pa. 452, 366 A.2d 574 (1976), we were called upon to examine an earlier version of Article V, section 13(b). Under

that version, the length of the appointed term was defined as being as follows:

(b) A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. . . . The person so appointed shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs. . . .

The present alternative "or for the remainder of the unexpired term, whichever is less," was not present in that version of the section. Thus the question arose as to whether the ten-month provision of section 13(b) would extend the appointed term beyond the time that the vacant term would have expired. In Berardocco an action in quo warranto was entertained by this Court in its original jurisdiction pursuant to section 201(3) of the Appellate Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, 17 P.S. § 211.201(3), now 42 Pa.C.S. § 721(3), to determine whether the relator, who had been elected during the municipal election to fill the seat, was entitled to hold the office which was then being occupied by the appointee under Article V, section 13(b). It was in this context that the court relied upon the constitutional preference for an elected judge over an appointed judge to remedy the unprovided for circumstance in the earlier version. That omission has been rectified in the present version and there is no further need to engage in judicial construction under this specific provision. The language is clear and unambiguous, and all contingencies can be made to fall within the express terms of this provision. Thus there is no further justification for proceeding in a manner that is not expressly provided for by the provision.

Even where the term was scheduled to end within "ten months after the vacancy", the traditional election process was not triggered because it was anticipated that the new term would be filled by a retention election. The provisions of Article V, section 13(b), can be satisfied without distortion of the plain language. In such a situation the former encumbent would be deemed to have been the nominee elected by both political parties and the parties can fill that position on the ballot in the municipal election under the provisions for substituted nominees provided for in the Election Code. 25 P.S. §§ 2882, 2939, 2941. Such a situation arose with the untimely death of Judge Thomas Harper, Court of Common Pleas of Allegheny County, who died on June 24, 1983. His name was to have appeared on the ballot for the municipal election to be held in November of 1983. In that case both political parties were permitted to name a candidate to run for that office during the municipal election of that year. [***29]

n10 As will be discussed *infra*, if we had permitted this situation to continue, we would have created and perpetuated the problem presented in *Cavanaugh*. The result would have been two additional seats which would end in odd numbered years and would require the election for the new term to occur during a general election.

 -	_	_	_	-	-	-	-	-	-	-	-	-	_	-End	Footnotes-	_	_	-	-	-	-	-	_	_	_	_	_	_	 _	_

It is evident that we are compelled to comment upon the continuing vitality of our decision in Cavanaugh. The sui generis quality of the issue presented in Cavanaugh should have been readily apparent. The problem arose because the office of Justice of the Supreme Court was formerly assigned a term of twenty-one years. Where a term of office is assigned an odd number, if it commences in an even-numbered year, it will expire in an odd-numbered year. Conversely, if that odd-numbered term began in an odd-numbered year, it would expire in an even-numbered year and would continue to alternate in this manner into infinity. In contrast, where the term commencing in an evennumbered year is for an even number of years, it will always expire in an even-numbered [***30] year and the election to fill the new term can properly be held in the preceding municipal election. After the adoption of the present Article I in 1968, all judicial terms of office were assigned an even number and the former twenty-one-year term was abolished. At the time that the Cavanaugh issue was presented to this Court, there were only two twenty-one-year terms yet to expire. One was the seat of the then Chief Justice O'Brien which was to expire in January of 1983 and the seat of the late Chief Justice Roberts which was to expire in 1984. The [*58] Roberts seat did not present the problem because it expired in an even-numbered year and would be succeeded by a ten-year (even numbered) term. Thus, the Cavanaugh court was not presented with a precedent setting issue but merely the adjustment of one term of office so that it would fall within the scheme clearly mandated under Article V.

The strong policy reasons that gave rise to the constitutional mandate that judicial elections should be held in municipal elections applies statewide as well as to the judges of the "several judicial districts." Pa. Const. art. VII, § 3. In general elections the citizens of this [***31] Commonwealth are called upon to elect either a President or a Governor. Because of the importance of selecting good judges, it was concluded that the election of judges in an election where either a President or Governor was being elected would detract from the public attention required for the filling of the judicial office. Even the detractors of the popular selection of judges must concede the wisdom of this policy as long as we retain elected judges. Although they may challenge the efficacy of electing judges, they cannot legitimately dispute that a presidential or gubernatorial race distracts the voters in their selection of judicial officers. Thus the exception provided in Article VII, section 3 lost its viability with the adoption of Article V in 1968. Rather than attempting to perpetuate the issue, the Cavanaugh Court could have employed the vehicle provided for in Article VII, section 3 by holding that the term of Chief Justice O'Brien could have been extended to the "next succeeding even-numbered year." Pa. Const. art. VII, § 3. Notwithstanding the language of the majority opinion in Cavanaugh, its sui generis quality must be recognized and therefore that [***32] decision provides no authority beyond the holding in that specific case. Henceforth, all judicial elections shall be held during the municipal election as prescribed by Article V, section 13(b), of our Constitution.

[**195] For the foregoing reasons this Court entered its order September 27, 1988.

[*59] The petitions for reargument filed in this matter are denied.



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152 Vt. 363, *; 566 A.2d 1323, **; 1989 Vt. LEXIS 189, ***

American Trucking Associations, Inc., Fort Edward Express Co., Inc., and J.A. Carman Trucking Co., Inc., Individually and On Behalf of All Others Similarly Situated v. William H. Conway, Jr., Vermont Commissioner of Motor Vehicles, Madeleine M. Kunin, Governor of the State of Vermont, Susan C. Crampton, Secretary of the Vermont Agency of Transportation, Charles A. Bristow, Vermont Commissioner of Public Safety, and Emory A. Hebard, Vermont State Treasurer, Each Individually and In Their Official Capacities

No. 87-300

Supreme Court of Vermont

152 Vt. 363; 566 A.2d 1323; 1989 Vt. LEXIS 189

August 25, 1989, Opinion filed

PRIOR HISTORY: [***1]

Appeal from decision declaring reciprocal truck tax unconstitutional and ordering defendants to refund to plaintiffs taxes collected and reserved by them in a court-ordered escrow account. Washington Superior Court, *Morse*, J. (escrow order), and *Cheever*, J. (final order), presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant government officials appealed a decision of the Washington Superior Court (Vermont), which declared a reciprocal truck tax, <u>Vt. Stat. Ann. tit. 23, § 417(a)</u>, unconstitutional and ordered the government officials to refund to plaintiffs, class of taxpayers, taxes collected and reserved by them in a court-ordered escrow account.

OVERVIEW: The class of taxpayers challenged a reciprocal fee imposed on certain trucks registered in states other than Vermont, claiming that it discriminated against interstate commerce. After the court determined that the fees were unconstitutional, the legislature again amended the fee system. The court found the challenged provisions unconstitutional. The taxpayers did not challenge <u>Vt. Stat. Ann. tit. 23, § 417(a)</u>. The taxpayers then commenced a third action to challenge § 417(a). The trial court declared the reciprocal truck tax unconstitutional and ordered the

government officials to refund the taxes collected and reserved in an escrow account. The court affirmed, holding that the doctrines of issue preclusion and claim preclusion did not prevent the taxpayers from challenging the truck tax because the causes of action and the issues were not the same in the earlier litigation. Section 417(a) discriminated against out-of-state trucks on its face and therefore violated the Commerce Clause. The trial court's order complied with Vt. R. Civ. P. 65(d) where it specified its terms in reasonable detail. Sovereign immunity was not applicable in a challenge to the recovery of escrowed sums.

OUTCOME: The court affirmed the trial court's decision that declared a reciprocal truck tax unconstitutional and ordered the government officials to refund to the class of taxpayers those taxes collected and reserved by them in a court-ordered escrow account.

CORE TERMS: truck, escrow, interstate commerce, sovereign immunity, registered, prospectively, discriminate, invalid, constitutional challenge, causes of action, laches, refund, inequity, claim preclusion, injunction, reciprocal, equitable, escrow account, collected, interstate, new rule of law, complementary, certificate, third-tier, domestic, highway, issue preclusion, state tax, estoppel, judicata

LexisNexis(TM) HEADNOTES - Core Concepts - + Hide Concepts

Civil Procedure > Preclusion & Effect of Judgments > Collateral Estoppel HNI The doctrine of issue preclusion bars the subsequent relitigation of an issue that was actually litigated and decided in a prior case between the same parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action. Civil Procedure > Preclusion & Effect of Judgments > Res Judicata $^{HN2}\square$ Under the doctrine of claim preclusion, parties are barred from litigating claims or causes of action that were or should have been raised in previous litigation, where the parties, subject matter, and causes of action are identical or substantially identical. Civil Procedure > Preclusion & Effect of Judgments > Res Judicata $^{HN3}\square$ Causes of action are the same for purposes of claim preclusion where the same evidence will support the action in both instances. Constitutional Law > Congressional Duties & Powers > Commerce Clause Tax Law > State & Local Tax Constitutional Law > Equal Protection > Scope of Protection HN4 In considering the constitutionality of taxes affecting interstate commerce, the court must ascertain, inter alia, whether the challenged tax improperly discriminates against such commerce. A state tax is not invalid per se because it burdens interstate commerce. Nevertheless, a

state tax that discriminates against interstate commerce by providing a direct commercial advantage to local businesses is unconstitutional.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

 $^{\mathit{HNS}}\square$ A state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation. Constitutional Law > Congressional Duties & Powers > Commerce Clause Tax Law > State & Local Tax HN6 The doctrine of compensatory taxes is a narrow exception to the Commerce Clause's prohibition of state taxes that discriminate against interstate commerce. If a state has enacted a tax solely on an in-state activity, the doctrine allows it to compensate for that tax by enacting an identical tax on the interstate equivalent of the in-state activity. The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. Civil Procedure > Injunctions > Preliminary & Temporary Injunctions Civil Procedure > Injunctions > Temporary Restraining Orders HNZ Vt. R. Civ. P. 65(d) mandates that every restraining order and order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; and shall describe in reasonable detail the act or acts sought to be restrained. Civil Procedure > Trials > Bench Trials ^{HN8}□ Vt. R. Civ. P. 52(a) provides that findings of fact and conclusions of law are unnecessary on decisions of motions except as provided in Vt. R. Civ. P. 41(b), regarding the involuntary dismissal of an action. It should also be noted that under Rule 52(a), all parties have the right to request written findings and conclusions within five days after notice of the decision. Civil Procedure > Trials > Bench Trials ^{HN9} Vt. R. Civ. P. 52(a) states in part that in all actions tried upon the facts without a jury or with an advisory jury, the court shall, upon request of a party participating in the trial made on the record or in writing within five days after notice of the decision, or may upon its own initiative. find the facts specially and state separately its conclusions of law thereon; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Governments > State & Territorial Governments > Claims By & Against HN10 Suits challenging the constitutionality of a state statute or its enforcement are not considered suits against the state for purposes of sovereign immunity. But an action to recover money that would be payable from state funds may be barred as a suit against the state. Governments > State & Territorial Governments > Claims By & Against $^{\it HN11}\Box$ The doctrine of sovereign immunity precludes the maintenance of

actions for the recovery of money against the state, unless the state has consented to be sued. Immunity is not applicable in cases

received, and will never receive, the money. Governments > State & Territorial Governments > Employees & Officials HN12 Vt. Stat. Ann. tit. 32, § 502 provides that the gross amount of money received by members of the executive branch in their official capacities shall be paid forthwith into the state treasury. Governments > Legislation > Effect & Operation > Prospective & Retrospective Operation HN13 The prospectivity doctrine is an exception to the general rule that judicial decisions are applied retroactively. Even where relief is specifically held to be prospective only, courts generally make an exception for the case in which the new rule of law is being enunciated. Civil Procedure > Appeals > Standards of Review > Abuse of Discretion Civil Procedure > Jurisdiction > Equity Jurisdiction $^{\mathit{HN14}}\square$ In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Moreover, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. ☐ Governments > Courts $^{ extit{HN15}}\square$ Relief will be nonretroactive only where the case establishes a new rule of law, either by overruling clear past precedent or by deciding a matter of first impression in a manner "not clearly foreshadowed," and where its retroactive application would be inequitable. Civil Procedure > Appeals > Standards of Review > Abuse of Discretion ☐ Governments > Courts HN16 The decision to apply a new rule of law prospectively only is within the trial court's discretion. The defendant bears the burden of demonstrating that the trial court either abused its discretion or withheld it entirely. Business & Corporate Entities > Foreign Businesses HN17 Vt. Stat. Ann. tit. 11, § 2101(a) provides in part that no foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state. Business & Corporate Entities > Foreign Businesses HNIS Vt. Stat. Ann. tit. 11, § 2101 requires foreign corporations "doing business" in Vermont to obtain certificates of authority, and Vt. Stat. Ann. tit. 11, § 2102 states that foreign corporations with such certificates have the same rights and privileges as domestic corporations.

Business & Corporate Entities > Foreign Businesses

involving the recovery of escrowed sums because the state has not

The express statutory provision regarding a foreign corporation's ability to maintain a lawsuit is found in <u>Vt. Stat. Ann. tit. 11, § 2120</u>, which provides that a foreign corporation shall not maintain an action in this state upon a contract made by it in this state if, at the time of making such contract, it was doing business in this state without lawful authority.

Civil Procedure > Justiciability > Standing

One who has accepted the benefits bestowed by a statute, or who has acquired rights of property necessarily based upon it, may not thereafter attack that statute as unconstitutional.

Torts > Procedure > Commencement

**HN21 The equitable doctrine of laches is applied to prohibit the maintenance of actions where the party requesting relief has failed to assert his right for an unreasonable and unexplained period of time and where the delay has been prejudicial to the defending party.

<u>Civil Procedure > Appeals > Standards of Review > Abuse of Discretion</u> <u>Torts > Procedure > Commencement</u>

HN22 Laches is primarily a matter of discretion on the part of the trial court, whose decision will not be disturbed unless clearly shown to be wrong.

* Show Headnotes

COUNSEL: Ralph A. Foote and Robert H. Moyer of Conley & Foote, Middlebury, Daniel R. Barney and Robert Digges, Jr., ATA Litigation Center, and William S. Busker, Vice President, Legal Affairs, American Trucking Associations, Inc. (Of Counsel), Alexandria, Virginia, for Plaintiffs-Appellees.

Jeffrey L. Amestoy, Attorney General, and Thomas R. Viall, Assistant Attorney General, Montpelier, for Defendants-Appellants.

JUDGES: Allen, C.J., Peck and Gibson, JJ., and Barney, C.J. (Ret.) and Keyser, J. (Ret.), Specially Assigned.

OPINIONBY: GIBSON

OPINION: [*366] [**1326] Defendants appeal from a decision of the Washington Superior Court declaring 23 V.S.A. § 417(a) unconstitutional and ordering defendants to refund to plaintiffs the taxes collected and reserved by them in a court-ordered escrow account. We affirm.

In the case before us, plaintiffs n1 challenge a reciprocal fee imposed on certain [***2] trucks registered in states other than Vermont. The provision at issue, 23 V.S.A. § 417, was first adopted in 1951, No. 210, § 3, and assessed a \$ 3 fee on the entry into Vermont of trucks from states which imposed taxes on Vermont trucks in addition to fuel taxes. Section 417 was amended in 1961 and 1972 to raise the fee first to five, and then to ten, dollars. 1961, No. 286, § 3 and 1971, No. 226 (Adj. Sess.), § 3.

n1 The members of the plaintiff class were defined by court order as "all nterstate motor carriers primarily registered outside the State of Vermont and who have been or may be subject to payment of highway use permit fees" under 23 V.S.A. § 417.

In 1981, the Legislature passed Act 87, which, inter alia, amended § 417 to require a \$ 15 trip fee for each entry of a truck registered in another jurisdiction, plus a \$ 10 entry fee for each entry of a truck registered in a state imposing "more than one tax, fee or toll" on vehicle usage within that state. 1981, No. 87, § 19, codified at 23 V.S.A. § 417(a). [***3] American Trucking Associations, together with two other named plaintiffs, immediately commenced a class action challenging the entry fees imposed by Act 87 on the ground that they discriminated against interstate commerce. After the superior court dismissed their complaint, this Court on appeal remanded the matter for further findings of fact. American Trucking Associations, Inc. v. Conway, 142 Vt. 17, 23, 451 A.2d 42, 45 (1982) (American Trucking 1).

[*367] On remand, the superior court concluded that the challenged entry fees were constitutional. On appeal, we reversed, concluding that "Act 87 on its face discriminates against interstate commerce and violates the Commerce Clause." <u>American Trucking Assns, Inc. v. Conway</u>, 146 Vt. 574, 577, 508 A.2d 405, 407 (1986), cert. denied, 483 U.S. 1020 (1987) (American Trucking 2).

While the appeal in *American Trucking 1* was pending, the Legislature again amended the fee system for foreign trucks, including § 417(a). 1981, No. 172 (Adj. Sess.). American Trucking Associations, joined by two other named plaintiffs, again initiated a class action which challenged the constitutionality of certain provisions of **[***4]** Act 172, codified at 23 V.S.A. §§ 415, 3007, and 3010. They did not challenge § 417(a) as amended. In *American Trucking Associations, Inc. v. Conway*, 146 Vt. 579, 586, 508 A.2d 408, 413 (1986), cert. denied, 483 U.S. 1019-20 (1987) (*American Trucking 3*), this Court struck down those three provisions as unconstitutional.

In both American Trucking 2 and American Trucking 3, plaintiffs' claims for monetary relief were denied on the grounds that actions to recover moneys payable out of state funds are barred by the doctrine of sovereign immunity as a suit against the state. 146 Vt. at 579, 508 A.2d at 408, and 146 Vt. at 587-88, 508 A.2d at 413-14.

One month after we handed down our decisions in *American Trucking 2* and *American Trucking 3*, American Trucking Associations, together with two other named plaintiffs, commenced a third class action suit to challenge the constitutionality of 23 V.S.A. § 417(a) as amended by Act 172. Accompanying the original complaint was a motion for a preliminary injunction or for the escrowing of tax proceeds pending the resolution of the challenge. In April of 1986, the superior court granted the motion and ordered that the [***5] proceeds of the tax collected pursuant to § 417(a) be escrowed by the State

Treasurer so that "at no time shall such monies become a part of or deposited in the State Treasury." Defendants filed a petition for extraordinary relief alleging that the superior court's escrow order was unlawful and contrary [**1327] to the public interest; the petition was summarily denied by this Court in an unpublished order issued April 9, 1987.

[*368] In the meantime, the case was argued on the parties' competing motions for summary judgment in October of 1986. A memorandum of decision and order, issued May 4, 1987, concluded that 23 V.S.A. § 417(a) was unconstitutional, and on June 22, 1987 the superior court issued a judgment order permanently enjoining defendants from the continued collection of the § 417(a) taxes, denying plaintiffs' claim for taxes paid prior to the establishment of the escrow, and ordering that the proceeds in the escrow account plus accrued interest be refunded to the plaintiffs. Defendants appeal all these decisions, including the establishment of the escrow.

Defendants raise numerous arguments in support of their appeal: (1) that the instant litigation is barred by principles [***6] of issue and claim preclusion; (2) that 23 V.S.A. § 417(a) is constitutional under previous decisions of this Court; (3) that the escrow order is invalid as procedurally defective; (4) that the escrow order violates the doctrine of sovereign immunity; (5) that no refund should be allowed because any finding of unconstitutionality should be applied prospectively only; (6) that plaintiffs were unqualified to bring suit in Vermont as unregistered foreign corporations; and (7) that plaintiffs are precluded from any recovery on various equitable principles.

I.

Defendants contend that plaintiffs are barred from litigating the validity of this tax by the doctrines of res judicata or collateral estoppel. We note that these doctrines involve separate and distinct concepts, although the umbrella term res judicata is often applied to the use of both theories of estoppel. For ease of discussion in this opinion, we will refer to the two doctrines by the more descriptive terms of claim preclusion and issue preclusion. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4402 (1981) (discussing res judicata in context of Federal Rules of Civil Procedure); Restatement (Second) [***7] of Judgments ch. 3, Introductory Note (1982). In essence, defendants argue that both issue and claim preclusion bar the instant litigation.

Defendants first contend that § 417(a) was declared constitutional in *American Trucking 2*, and that, therefore, the doctrine of issue preclusion renders this lawsuit repetitive and unnecessary: "This Court has already disposed of [plaintiffs'] [*369] challenge to the constitutionality of 23 V.S.A. § 417, albeit in its form adopted in 1981." The trial court rejected this contention, stating that "while the Court [in *American Trucking 2*] did not expressly single out section 417(a) as unconstitutional, it did clearly hold unconstitutional the scheme" of which that section was a part.

HNI The doctrine of issue preclusion bars the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the same parties resulting in a final judgment on the merits, where that issue was

necessary to the resolution of the action. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4416, at 137-38 (1981); see also <u>Berisha v. Hardy</u>, 144 Vt. 136, 138, 474 A.2d 90, 91 (1984) (collateral estoppel, [***8] which is more limited than res judicata, bars relitigation of issues "'necessarily and essentially determined'" in prior action) (quoting <u>Land Investment, Inc. v. Battleground Associates</u>, 138 Vt. 316, 326, 415 A.2d 753, 759 (1980)).

It is clear that what was at issue in *American Trucking 2* was not the same § 417(a) that is before us today. As we noted above, the § 417(a) struck down in *American Trucking 2* was that enacted into law by Act 87 in 1981. The current version of 23 V.S.A. § 417(a) derives from Act 172, passed into law in 1982. Although minimal, the changes between the two provisions are significant enough to render them outside the scope of issue preclusion's requirement of *identical* issues. n2 Thus, it [**1328] was neither actually litigated nor decided, and no preclusive effect will attach to our decision as to § 417 in the [*370] prior litigation. n3 See *Berisha v. Hardy*, 144 Vt. at 138, 474 A.2d at 91.

n2 Act 172, § 6 amended <u>23 V.S.A. § 417(a)</u> as follows:

If a ton-mile tax, or a tax requiring quarterly or monthly reporting is imposed on Vermont registered vehicles by another state in addition to that state's diesel fuel tax, then there shall be charged an additional \$ 10.00 for each entry into this state of any truck registered in the state charging the additional tax, fee or toll.

(Underlined text is new; deletions are struck out.) [***9]

n3 We also note that our reading of *American Trucking 2* is diametrically opposed to defendants', in that the issues litigated in that action -- all provisions of Act 87, which included § 417's entry fee/surcharge requirements -- were held unconstitutional. See 146 Vt. at 575, 508 A.2d at 405. Thus, we agree with the trial court that if any preclusive effect is given to that litigation, it would inure to plaintiffs' benefit.

Defendants also contend that because certain provisions of Act 172 were constitutionally challenged in *American Trucking 3*, plaintiffs' claim must be barred by the doctrine of claim preclusion. HN2 Under this theory of estoppel, parties are barred from litigating claims or causes of action which were or should have been raised in previous litigation, Hill v. Grandey, 132 Vt. 460, 463, 321 A.2d 28, 30 (1974), where the parties, subject matter and causes of action are identical or substantially identical. Berisha v. Hardy, 144 Vt. at 138, 474 A.2d at 91.

American Trucking 3 involved a constitutional attack on three provisions of Act

172, codified at §§ 415, 3007 **[***10]** and 3010 of 23 V.S.A., under which trucks over 18,000 pounds operating on Vermont highways were required either to pay a \$ 50 annual licensing fee, acquire a \$ 50 "single trip permit," or acquire a \$ 50 "temporary authorization." Plaintiffs challenged these "user fees" as unconstitutionally burdensome on interstate commerce. This Court upheld the challenge. 146 Vt. at 586, 508 A.2d at 413.

Although plaintiffs in American Trucking 3 attacked three sections of Act 172, they did not challenge § 417(a) as amended by that same act. Our inquiry, then, is whether the two causes of action are so interrelated that plaintiffs ought to have raised both in that litigation. We conclude that they are not. This Court has previously characterized HN3□causes of action as the same for purposes of claim preclusion where "the same evidence will support the action in both instances." Hill v. Grandey, 132 Vt. at 463, 321 A.2d at 31. The tax challenged in American Trucking 3 was a \$ 50 annual user fee imposed on all trucks, which was effectively offset by a \$ 50 registration fee reduction benefiting Vermont trucks only, thereby "shift[ing] the entire impact of the user fee legislation onto [***11] [*371] foreign operators" and resulting in unconstitutional discrimination on its face. 146 Vt. at 584, 508 A.2d at 412. The provision being challenged today involves a wholly separate scheme of taxation having an impact only on trucks from the nine states imposing "thirdtier" n4 taxes on foreign-registered trucks. The evidence needed to support this challenge is sufficiently different from that involved in the user-fee challenge of American Trucking 3 that we cannot say the two causes of action are identical for claim preclusion purposes.

n4 Third-tier taxes, also called third-structure taxes, are those other than registration fees or motor fuel taxes.

Even were we to hold otherwise, we would agree with the trial court's conclusion that "[t]o allow a potentially unconstitutional statute to stay in effect because of an error in judgment would needlessly exalt form over substance." We do not think this would serve either the parties subjected to an unconstitutional tax, or the general doctrine of res judicata [***12] -- a judicially created rule of law -- which seeks to keep court dockets clear of unnecessary litigation, while offering litigants reliance on final judgments as well as repose from continuous litigation arising out of the same occurrence or set of facts. See generally Wright, Miller & Cooper, supra, § 4403; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

[**1329] II.

Defendants next contend that 23 V.S.A. § 417(a) is permissible under previous opinions of this Court as a retaliatory or reciprocal tax complementary to those taxes imposed on Vermont-registered trucks by jurisdictions requiring the payment of third-tier taxes for Vermont trucks using their highways. Defendants argue that American Trucking 3 held certain user fees unconstitutional because they were not complementary to fees imposed on Vermont trucks, and that the taxes challenged in American Trucking 2

were similarly unconstitutional because they were not complementary to the sales and use taxes and the registration fees imposed on Vermont trucks.

In essence, defendants base their premise of statutory constitutionality on the fact that the tax imposed by § 417(a) is directed only at trucks whose home [***13] jurisdictions impose [*372] third-tier taxes on Vermont trucks: because these taxes are "complementary," they contend, they are constitutional under both *American Trucking 2* and *American Trucking 3*. This argument virtually ignores the constitutional analysis applied by this Court in both those cases.

HN4* In considering the constitutionality of taxes affecting interstate commerce, this Court must ascertain, inter alia, whether the challenged tax improperly discriminates against such commerce. **Complete Auto Transit, Inc. v. **Brady*, 430 U.S. 274, 287 (1977); see **American Trucking 3, 146 Vt. at 583-84, 508 A.2d at 411.** It is by now axiomatic that a state tax is not invalid per se because it burdens interstate commerce. **Maryland v. **Louisiana*, 451 U.S.** 725, 754 (1981).** Nevertheless, a state tax which discriminates against interstate commerce by providing a direct commercial advantage to local businesses is unconstitutional. **Id.**; **American Trucking 3, 146 Vt. at 584, 508 A.2d at 412.**

Section 417(a) imposes a trip tax on certain trucks entering Vermont:

If a ton-mile tax, or a tax requiring quarterly or monthly reporting is imposed on Vermont registered vehicles [***14] by another state in addition to that state's diesel fuel tax, then there shall be charged an additional \$ 10.00 for each entry into this state of any truck registered in the state charging the additional tax, fee or toll.

23 V.S.A. § 417(a). The impact of the tax is limited to only those trucks, registered in any of nine states which currently impose such third-tier taxes on foreign trucks, that enter this state in the course of interstate commerce. No Vermont trucks are affected.

It is clear that this tax facially discriminates against trucks from those nine states. Defendants argue that this discrimination is nullified by the fact that those states would exact a similar tax from Vermont trucks using their highways. But we do not agree that the retaliatory nature of the tax imposed by \S 417(a) negates the facial discrimination.

A similar argument was made before the Maine Supreme Court in the recent case of <u>Private Truck Council of America, Inc. v. Secretary of State, 503 A.2d 214</u> (Me.), <u>cert. denied</u>, <u>476 U.S. 1129 (1986)</u>. The Maine statute challenged in that case **[*373]** was essentially identical to that at issue here. As the Maine court stated, the law "had **[***15]** as its candid purpose coercive retaliation to force the . . . 'offending' states to drop the extra tax burdens they impose on Maine trucks." <u>Id. at 218</u>. That solution was rejected in no uncertain terms:

To the extent, if any, that the . . . states whose vehicles are currently subject to Maine's reciprocal truck tax are themselves unconstitutionally burdening interstate commerce with their third structure taxes, "the Commerce Clause itself creates the necessary reciprocity: [Maine and its truckers] may pursue their constitutional remedy by suit in state or federal court challenging [those . . . states'] actions as violative of the Commerce Clause," instead of enacting retaliatory taxes.

[**1330] *Id.* (quoting *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976)). The court concluded that "** [a] state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation." *Id.*; see also *Department of Revenue v. Private Truck Council of America, Inc.*, 531 So. 2d 367, 369 (Fla. Dist. Ct. App. 1988) ("[d]iscrimination cannot be corrected by retaliation"); *Private Truck Council of America,* [***16] *Inc. v. State*, 128 N.H. 466, 472, 517 A.2d 1150, 1154 (1986) (same; "'to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution'") (quoting *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920)).

Defendants' arguments that the § 417(a) tax is valid as a "complementary" or "compensatory" tax are inapposite. ***17 to doctrine of compensatory taxes is a narrow exception to the Commerce Clause's prohibition of state taxes that discriminate against interstate commerce. If a state has enacted a tax solely on an in-state activity, the doctrine allows it to compensate for that tax by enacting an identical tax on the interstate equivalent of the in-state activity. See **Alaska v. **Arctic Maid**, 366 U.S. 199, 204-05 (1961).** "The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." **State v. **Private Truck** Council of **America**, Inc.**, 258 Ga. 531, 533, 371 S.E.2d 378, 380 (1988) (quoting **Maryland v. **Louisiana**, 451 U.S.** at 759).** In order to fall within the [**374] compensatory-tax doctrine, there must be equality of treatment by **Vermont** with respect [***17] to domestic and foreign-registered trucks under its truck taxation scheme. Defendants have not brought any such provisions to our attention.

Because the tax discriminates against out-of-state trucks on its face, we hold that 23 V.S.A. § 417(a) must fall as offensive to the Commerce Clause. See *Private Truck Council v. Secretary of State*, 503 A.2d at 218.

III.

Defendants contend that the escrow order issued by the superior court is invalid because it does not comply with the specificity requirements of V.R.C.P. 65(d). **INT* That rule mandates that every restraining order and order granting an injunction "shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained." Relying on *Division of State Buildings v. Town of *Castleton Board of Adjustment, 138 Vt. 250, 257, 415 A.2d 188, 193 (1980), defendants contend that because the escrow order did not specify the factual findings upon which it was based, the order is invalid because no effective

appellate review may be had.

Defendants contend that in requiring "reasons" for the issuance of an injunction to be specified, Rule 65(d) actually [***18] mandates an exposition of the court's findings and conclusions. We disagree. If the rule required findings, it could have said so. Instead, "[t]hese prerequisites are designed to protect those who are enjoined by informing them of what they are called upon to do or refrain from doing in order to comply with the injunction or restraining order," so that the orders will not be so vague that affected persons will be at a loss to determine the scope of the restraint. 11 C. Wright & A. Miller, Federal Practice and Procedure § 2955, at 536 (1973) (commenting on Fed. R. Civ. P. 65(d)); see also *Division of State Buildings*, 138 Vt. at 257, 415 A.2d at 193 ("to protect against judicial excess, [Rule] 65(d) requires the court to specify . . . the reasons for issuance and the acts restrained"). Here, the order specifies its terms in reasonable detail, and the court set forth as its reason for issuing the order that "the express purpose of this provision . . . is to ensure a refund mechanism if the [c]ourt finds that [*375] such monies were wrongfully or illegally charged and collected" by defendants. The order as written complies with the requirements of V.R.C.P. 65(d).

We note [***19] that **HOS** V.R.C.P. 52(a) provides that "[f]indings of fact and conclusions of law [**1331] are unnecessary on decisions of motions" except as provided in Rule 41(b), regarding the involuntary dismissal of an action. It should also be noted that under V.R.C.P. 52(a), all parties had the right to request written findings and conclusions within five days after notice of the decision. n5 Defendants failed to do so, and cannot now seek relief from this Court because no findings and conclusions are set forth in the order appealed from.

n5 HN9 Rule 52(a) states in part that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall, upon request of a party participating in the trial made on the record or in writing within 5 days after notice of the decision, or may upon its own initiative, find the facts specially and state separately its conclusions of law thereon ; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action" (emphasis added).

IV.

Relying on American Trucking 3, defendants next claim that the escrow order is invalid because it violates the doctrine of sovereign immunity. That case involved a challenge to fueluser license fees under 23 V.S.A. §§ 415, 3007 and 3010. The trial court had found the statutes unconstitutional, but had denied plaintiffs' motion for a refund of the funds collected by the state pursuant to those provisions. In discussing the latter issue, we stated that

HN10 suits challenging the constitutionality of a state statute or its enforcement are not considered suits against the state for purposes of sovereign immunity. But an action to recover money which would be payable from state funds may be barred as a suit against the state.

<u>146 Vt. at 587, 508 A.2d at 413-14</u> (citations omitted). We concluded that plaintiffs' claim for a refund of taxes already collected by the state was barred by sovereign immunity.

[*376] Defendants claim that the facts of this case fall squarely within the prohibition of *American Trucking 3*, since the escrow order was merely a fiction intended to circumvent the doctrine of sovereign immunity. We do not agree.

****21] precludes the maintenance of actions for the recovery of money against the state, unless the state has consented to be sued. See, e.g., *American Trucking 3, 146 Vt. at 587-88, 508 A.2d at 414. Defendants here contend that no such consent has been given.

But this is not a suit for money damages against the state. As the Tenth Circuit Court of Appeals stated in a similar challenge to the recovery of escrowed sums, immunity is not applicable in such cases because "[t]he state has not received, and will never receive, the money." *Gallagher v. Evans*, 536 F.2d 899, 901 (10th Cir. 1976).

Defendants have attacked the validity and maintenance of the escrow account in this case on various technical grounds, as discussed below. Here, they challenge it on philosophical grounds: an escrow account should not be used to avoid the application of the doctrine of sovereign immunity. We agree that that is the result of the escrow in this case, but do not conclude that the use of an equitable remedy such as an escrow is therefore invalid.

A number of courts have used escrow accounts when faced with constitutional attacks on the validity of taxing statutes. In fact, United States Supreme [***22] Court Justice Blackmun, in his role as Circuit Justice, recently ordered the establishment of an escrow in *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306 (1987), involving a challenge to Arkansas's truck taxes. Analyzing the request for an escrow along the traditional lines of an injunction, he concluded that equitable principles favored the establishment of the account. *Id.* at 1310. In so doing, Justice Blackmun cited our decision in *American Trucking 3*, noting that plaintiffs faced irreparable injury because, absent injunctive relief, there was "a risk that, like other state courts, the Arkansas courts would deny restitution of taxes found to have been unconstitutionally collected." *Id.* at 1309. See also *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d at 219-20 (establishing escrow); [*377] [**1332] *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. at 473, 517 A.2d at 1155 (same).

Defendants also argue that the escrow order interferes with the express intent

of HN12 32 V.S.A. § 502, which provides that "[t]he gross amount of money received [by members of the executive branch] in their official capacities. [***23] . . shall be paid forthwith into the state treasury" (emphasis added). We do not see the escrow order as placing defendants in conflict with their official duties under § 502. Any taxes collected by them under the escrow order were not "in their official capacities." As the trial court pointed out, it is inconceivable that a statute designed to prohibit an unlawful diversion of state funds should be interpreted to restrict the court's judicial prerogatives in the exercise of its equitable powers.

٧.

Defendants next argue that refunding the taxes in the escrow account is not the proper remedy, given the power of the court to fashion prospective-only relief, particularly in the exercise of equity jurisdiction. See Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-66 (1932). We begin our analysis of this argument by noting that HN13 the prospectivity doctrine is an exception to the general rule that judicial decisions are applied retroactively. See St. Francis College v. Al-Khazraji, 481 U.S. 604, 608 (1987); see also United States v. Schooner Peggy, 5 U.S. (1 Cranch 37) 103 (1801). We further note that even where relief is specifically held to be prospective [***24] only, courts generally make an exception for the case in which the new rule of law is being enunciated. See, e.g., Richard v. Richard, 131 Vt. 98, 106, 300 A.2d 637, 641 (1973) (effect of decision "is applicable only to the instant case, and other actions that may be brought in the future, and is not to be applied retroactively"); see also Bergman v. Henry, 115 Idaho 259, 262, 766 P.2d 729, 732 (1988) (ruling "shall apply prospectively, that is, only to this case and other causes of action" arising after a stated date). What defendants are requesting here is an even more restrictive application of the doctrine of prospectivity: that our decision today be applied only to future cases, thus disallowing any financial recovery to plaintiffs herein.

[*378] Whether to fashion a remedy in a particular case so that it applies prospectively only is a decision within the discretion of the trial court. The United States Supreme Court emphasized this in its decision in <u>Lemon v. Kurtzman, 411 U.S. 192 (1973)</u>, in which defendants were claiming that the rule of law set forth in an earlier lawsuit between the parties (<u>Lemon v. Kurtzman, 403 U.S. 602 (1971)</u>) should be given prospective [***25] application only. The Court, relying on <u>Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15, 27 n.10 (1971)</u>, noted that HN14 □ "[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." <u>411 U.S. at 200</u>. Moreover, "equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Id.* (footnote omitted).

In the case of <u>Chevron Oil Co. v. Huson</u>, 404 U.S. 97, 106-07 (1971), the United States Supreme Court articulated a standard against which to measure the need for applying a decision prospectively instead of retroactively. This Court adopted a similar standard in <u>Solomon v. Atlantis Development, Inc.</u>, 145 Vt. 70, 74, 483 A.2d 253, 256 (1984): HN15 relief will be nonretroactive only where the case establishes a new rule of law (either by overruling clear past precedent or by deciding a matter of first impression in a manner "not

clearly foreshadowed"), and where its retroactive application would be inequitable. Defendants argue that this case falls within the precepts of *Solomon* and, thus, should be applied prospectively only. We disagree.

[**1333] First, we do not [***26] see this case as establishing a new rule of law. Our decision in *American Trucking 2* struck down a retaliatory tax almost identical to that challenged today, and for the same reasons: it facially discriminated against out-of-state truckers, and no Vermont tax imposed on domestic trucks offset that discrimination. 146 Vt. at 577, 508 A.2d at 407.

Second, we conclude that the retroactive application of our decision, so that a refund of the escrow proceeds is an appropriate remedy, works no inequity on defendants. Because the escrow was established, the funds collected pursuant to the unconstitutional taxing provision were never available to the state for use, thus obviating any reliance argument. Compare <u>Salorio v. Glaser</u>, 93 N.J. 447, 465, 461 A.2d 1100, 1109-10, [*379] cert. denied, 464 U.S. 993 (1983) (state's reliance on income from Emergency Transportation Tax -- millions of dollars had already been collected and spent, so that "public fiscal stability" was at issue -- was a factor in deciding that tax was unconstitutional prospectively only).

Even were we to conclude that this case falls squarely within the standards of *Chevron Oil* and *Solomon*, we **[***27]** reiterate that **HN16** the decision to apply a new rule of law prospectively only is within the trial court's discretion. *Lemon v. Kurtzman, 411 U.S. at 200. Here, the court refused to do so, and instead ordered that the funds collected in the escrow account be disbursed to plaintiffs. Defendants thus bear the burden of demonstrating that the trial court either abused its discretion or withheld it entirely. See, e.g., *Ohland v. Ohland, 141 Vt. 34, 39, 442 A.2d 1306, 1309 (1982). They have failed to do so. Either way, their argument that today's decision must be applied prospectively is rejected.

VI.

Defendants next claim that plaintiffs were not qualified to bring suit in Vermont because they are foreign corporations which have not filed certificates of authority in compliance with 11 V.S.A. § 2101. n6 They argue that only foreign corporations with such certificates are entitled to enjoy the same rights and privileges as domestic corporations, 11 V.S.A. § 2102, including the right to sue. 11 V.S.A. § 1852(2).

Footnotes
n6 HN1 \square 11 V.S.A. § 2101(a) provides in part that "[n]o foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state."
[*** 28]

Prior to the adoption of <u>11 V.S.A. §§ 1852</u> and 2101 in 1970, this Court held on several occasions that foreign corporations were entitled, under the principles of comity, to access to the courts of Vermont "unless expressly forbidden." *New England Road Machinery Co. v. Calkins*, 121 Vt. 118, 123,

149 A.2d 734, 738 (1959); Holbrook Grocery Co. v. Commissioner of Taxes, 115 Vt. 275, 278, 57 A.2d 118, 120 (1948); Siwooganock Guaranty Savings Bank v. Cushman, 109 Vt. 221, 247, 195 A. 260, 272 (1937). Defendants argue that such access is now "expressly forbidden" by §§ 2101 and 1852. We disagree.

[*380] **HN18** \square 11 V.S.A. § 2101 requires foreign corporations "doing business" in Vermont to obtain certificates of authority, and § 2102 states that foreign corporations with such certificates have the same rights and privileges as domestic corporations. Thus, defendants ask us to infer that foreign corporations without certificates are prohibited access to our courts, since the ability to sue is one of the domestic corporation's powers enumerated in 11 V.S.A. § 1852. This inference does not rise to the level of an "express" prohibition.

Instead, HN19 the express statutory provision regarding [***29] a foreign corporation's ability to maintain a lawsuit is found in 11 V.S.A. § 2120, which provides that "[a] foreign corporation shall not maintain an action in this state upon a contract made by it in this state if, at the time of making such contract, it was doing business in this state without lawful authority" (emphasis added). The claims raised by plaintiffs in this action are constitutional, not contractual, and are not barred by 11 V.S.A. § 2120.

[**1334] VII.

Finally, defendants have raised several defenses of an equitable nature which, they contend, require our reversal of the trial court's decision.

First, defendants argue that plaintiffs have benefited from the fees collected pursuant to 23 V.S.A. § 417(a), which (but for the escrow order) were to be used for the construction and maintenance of state and local highways, as those roads are "the very lifeblood of their interstate truck shipping businesses." We disagree.

The cases offered in support of defendants' position are readily distinguishable. *Brattleboro Retreat v. Town of Brattleboro*, 106 Vt. 228, 173 A. 209 (1934), did not involve the application of an unconstitutional tax. Rather, that case held that the Retreat [***30] was liable to pay taxes on its income in excess of the \$ 10,000 outlined in its original charter, as required by a legislative act in 1858, since it accepted "the provisions [of that act] beneficial to it." *Id.* at 237-39, 173 A. at 213.

Neither did <u>State v. Malmquist</u>, 114 Vt. 96, 40 A.2d 534 (1944), involve an unconstitutional taxing provision. Instead, defendant there contested the validity of an act passed in 1797 **[*381]** giving his predecessors in title the right to build a dam, because it was then to his advantage to lower the water in the lake to its pre-dammed level. This Court rejected his argument, stating that $^{HN20}\Box$ "[0]ne who has accepted the benefits bestowed by a statute, or who has acquired rights of property necessarily based upon it, may not thereafter attack that statute as unconstitutional." <u>Id. at 103, 40 A.2d at 539.</u> Similarly, in <u>Law's Administrator v. Culver</u>, 121 Vt. 285, 290, 155 A.2d 855, 858 (1959), we rejected plaintiff's claims that the Vermont statute under which he successfully effected service on a nonresident defendant was unconstitutional.

These cases all involved claims of unconstitutionality made by parties who had obtained substantive [***31] benefits under specific statutes. By contrast, 23 V.S.A. § 417(a) does not confer any personal substantive benefit on plaintiffs here. As the trial court stated, "[i]t is a tax, pure and simple." Since all citizens arguably benefit from a state tax, under defendants' argument no challenge to a tax law could ever be made. This position is meritless.

Next, defendants argue that because plaintiffs either did, or were able to, pass the cost of the tax through to their customers, any refund would constitute a windfall unjustly enriching them. We are not persuaded that this possibility, totally unsupported by any evidentiary showing on defendants' part, constitutes an inequity sufficient to support a finding of unjust enrichment. See <u>Center v. Mad River Corp.</u>, 151 Vt. 408, 412-13, 561 A.2d 90, 93-94 (1989) (plaintiff must prove inequity in order to recover damages under quasi-contract or unjust enrichment theory). Rather, we conclude that the inequity, if any, would lie in allowing defendants to retain the proceeds of an unconstitutional tax, where those monies were never made part of the state treasury nor, as a consequence, relied upon.

Last, defendants claim that because plaintiffs [***32] did not challenge the provision of § 417 until thirty years after this reciprocal truck tax was first created, they should now be precluded from asserting its unconstitutionality under the doctrine of laches. **HN21** The equitable doctrine of laches is applied to prohibit the maintenance of actions where the party [*382] requesting relief has failed to assert his right for an unreasonable and unexplained period of time and where the delay has been prejudicial to the defending party. **Stamato v. Quazzo, 139 Vt. 155, 157, 423 A.2d 1201, 1203 (1980).

Defendants have made no showing of prejudice of such substance warranting it inequitable for us to uphold plaintiffs' constitutional challenge to the tax statute at issue. Their claims of prejudice are centered on the contention that because the state has successfully collected taxes under various incarnations of § 417(a) for over thirty years, it ought not to lose this revenue now merely because the law is unconstitutional.

Affirmed.

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HOME RULE CHARTER

ARTICLE 7. THE EXECUTIVE BRANCH: PROGRAMS, SERVICES and ACTIVITIES

CHAPTER 3. ARTS

ec. 7-301. Department.

The arts department is headed by a seven (7) member ommission. The members of the commission shall be prointed by and serve at the pleasure of the mayor.

The term of membership on the commission is four (4) rears, and not more than two (2) members' terms expire ach year.

The commission shall appoint, with approval of the nayor, the arts director and a deputy arts director. The lirector and the deputy director serve at the pleasure of he commission.

The arts department shall maintain and operate the Detroit Institute of Arts.

ARTICLE 7. THE EXECUTIVE BRANCH: PROGRAMS, SERVICES and ACTIVITIES

CHAPTER 4. BUILDING

Sec. 7-401. Duty Under Zoning Law.

The building department shall administer and enforce all laws, ordinances and regulations relating to the use of land ("zoning").

Sec. 7-402. Applications Filed Under Zoning Law.

All applications for permits, grants, variances, waivers or exceptions of any kind under zoning laws, ordinances and regulations shall be made to the department.

The department may allow or deny permits, grants, variances, waivers and other exceptions upon the terms and conditions provided by ordinance.

Sec. 7-403. Board of Zoning Appeals.

Except as otherwise provided by an ordinance, one (1) appeals board with the powers and duties that may be provided by ordinance shall be established by the city council in accordance with state law to review any decision made by the department under section 7-402 where any law, ordinance or regulation requires review by an appeals board.

The ordinance shall provide for rules governing the appeal, including the parties entitled to be heard in proceedings before the appeals board and the effect of a decision of the board, and may provide compensation for board members.

In any review proceeding, the building department shall file a written statement and may appear before the appeals board in support of its decision.

Sec. 7-404. Duty Under Other Regulatory Laws.

To the extent practicable, the department shall also administer and enforce all other laws and ordinances regulating the development, maintenance and use of real property in the city.

Sec. 7-405. One-Stop Service.

To the extent practicable, the department shall, in cooperation with other agencies whose permission is required prior to development, establish a procedure and application form under which an applicant for development permission may obtain, through the department, all necessary permission.